No. PD-1371-13

IN 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

ORIGINATING IN THE 379TH DISTRICT COURT, BEXAR COUNTY
NO. 2012-CR-1148-W2

STATE'S BRIEF ON THE MERITS

Hon. Susan D. Reed
Criminal District Attorney
Bexar County, Texas

S. Patrick Ballantyne
Assistant Criminal District Attorney
Bexar County, Texas
State Bar # 24053759
101 W. Nueva St., 7th floor
San Antonio, Texas 78205
210-335-2404 (phone)
210-335-2773 (facsimile)
sballantyne@bexar.org

ORAL ARGUMENT REQUESTED

IDENTIFICATION OF PARTIES AND COUNSEL

Representing the State of Texas at Trial and on Appeal:

Hon. Susan D. Reed
Criminal District Attorney
Bexar County, Texas

S. Patrick Ballantyne, *on appeal.*
Assistant Criminal District Attorney
Bexar County, Texas
State Bar # 24053759

Jessica Frazier, *at trial.*
Assistant Criminal District Attorney
Bexar County, Texas
State Bar # 24057854

101 W. Nueva St., 7th floor
San Antonio, Texas 78205
210-335-2404 (phone)
210-335-2773 (facsimile)
sballantyne@bexar.org

Representing Appellant, Ronald Thompson at Trial and on Appeal:

Donald H. Flanary, III
State Bar # 24045877
Goldstein, Goldstein and Hilley
310 S. Saint Mary's St., Suite 2900
San Antonio, TX 78205
210-226-1463 (phone)
210-2268367 (facsimile)

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

I. STATEMENT OF THE CASE

This case concerns the constitutionality of Penal Code § 21.15(b)(1) – a part of Texas's Improper Photography statute. The case arises from a pretrial writ of habeas corpus by which Appellant challenged the facial validity of the statute's subsection. Appellant appealed the trial court's denial of relief, and the Fourth Court of Appeals reversed the trial court, declaring the entirety of § 21.15(b)(1) to be unconstitutionally overbroad.

II. STATEMENT REGARDING ORAL ARGUMENT

In granting discretionary review, this Court stated that oral argument will be permitted. Pursuant to Rule of Appellate Procedure 38.1, the State here reiterates its request for oral argument, as oral argument would allow the Members of the Court to explore the application of the statute and constitutional principles at issue more thoroughly than the constraints of written briefing alone would permit.

III. ISSUES PRESENTED

1. Did the Court of Appeals error in declaring Penal Code § 21.15(b)(1) [Improper Photography] facially unconstitutional?

2. Did the Court of Appeals error in holding that Penal Code § 21.15(b)(1) [Improper Photography] implicates the protections of the *First Amendment*?

3. Did the Court of Appeals error in declaring Penal Code § 21.15(b)(1) [Improper Photography] unconstitutional when it held "the application of the statute would potentially penalize some protected speech"?

4. Does Penal Code § 21.15(b)(1) [Improper Photography] reach a substantial amount of constitutionally protected conduct?

5. Did the Court of Appeals error in declaring the whole of Penal Code §21.15(b)(1) [Improper Photography] facially unconstitutional even though only part of the subsection was implicated by the charges in the indictment?

IV. STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is a challenge to the facial constitutionality of Penal Code § 21.15 (*Improper Photography*). Accordingly, no record of the factual circumstances of Appellant's alleged offense was developed in the Trial Court.

The procedural history of this case is as follows: This case arises from a pretrial writ of habeas corpus by which Appellant challenged the facial constitutionality of Penal Code § 21.15 (Improper Photography). On July 16, 2011, Appellant Ronald Thompson was arrested for the offense of Improper Photography in violation of Penal Code § 21.15. On February 13, 2012, an indictment was returned charging Appellant with 26 counts in violation of § 21.15(b)(1)'s *recording* provision. That cause is pending in the 379th District Court for Bexar County and designated *State v. Ronald Thompson*, No. 2012-CR-1148. On January

22, 2013, Appellant filed a pretrial writ of habeas corpus challenging the facial constitutionality of § 21.15. That writ was denied without hearing by the trial court on January 25, 2013. Notice of appeal was given on January 29, 2013. Pursuant to an order from the court of appeals, on March 7, 2013, the trial court issued an order clarifying that the denial was on the merits of the application. On August 30, 2013, the Fourth Court of Appeals issued an opinion in *Ex Parte Ronald Thompson*, No. 04-13-00127-CR, reversing the trial court and declaring § 21.15(b)(1) unconstitutionally overbroad. This Court granted the State's Petition for Discretionary Review on the 27th day of November, 2013.

V. SUMMARY OF THE ARGUMENT

The Fourth Court of Appeals erred when it struck down Penal Code § 21.15(b)(1) as unconstitutionally overbroad. Penal Code § 21.15 offends neither the United States nor Texas Constitutions and the lower court should be reversed for the following reasons:

1. ***First Amendment is not implicated:*** The statute does not impermissibly regulate the content of speech as it does not regulate speech itself but the non-expressive act of making a visual recording coupled with the photographer's specific intent. Any expressive conduct encompassed by the statute is constitutionally unprotected as it invades the substantial privacy interests of others in an essentially intolerable manner.

2. ***Speech regulation*:** Alternatively, the statute is a content-neutral regulation of the time, place, and manner of expressive conduct. The statute is content-neutral, because it neither limits photography because of the ideas expressed nor favors one type of visual recording over another. The statute advances legitimate governmental interests in protecting persons from privacy invasion and sexual exploitation, and the elements of specific intent and non-consent render the statute narrowly tailored to advance these interests.

3. ***Overbreadth challenge*:** The statute is not overbroad as it does not restrict a substantial amount of constitutionally protected conduct. Any expressive conduct reached by the statute is constitutionally unprotected as it invades the substantial privacy interests of others in an essentially intolerable manner

VI. ARGUMENT

1. The Improper Photography statute does not implicate the speech protections of the *First Amendment*, because it is not a restriction upon speech but a regulation of conduct.

The first question to be asked in any constitutional analysis is whether constitutional protections are even implicated. This is because the free speech protections of the *First Amendment* will be implicated only where the government seeks to regulate protected speech or expressive conduct. *See Scott v. State*, 322

S.W.3d 662, 668-669 (Tex. Crim. App. 2010). "It is the obligation of person desiring to engage in the assertedly expressive conduct to demonstrate that the *First Amendment* even applies." *Clark v. Comty. For Creative Non-Violence*, 468 U.S. 288, 294 (1984). This is especially important in the instant challenge, because Appellant may not bring a facial challenge to the constitutionality of § 21.15(b)(1) unless the statute restricts protected conduct. *See Bynum v. State*, 767 S.W.2d 769, 744 (Tex. Crim. App. 1989). The lower court incorrectly assumed without analysis that photography is inherently expressive conduct implicating the speech protections of the *First Amendment*. In actuality, the visual recording contemplated by § 21.15(b)(1) is not speech but an act which may only be deemed expressive depending on the circumstances of the recording.

At the forefront, it is important to recognize what particular portion of § 21.15(b)(1) is properly at issue in this case. Appellant is charged with 26 counts of violating § 21.15(b)(1) by means of *recording* subjects without their consent and for sexual arousal and gratification. Nowhere in the indictment is Appellant alleged to have *transmitted* or *broadcasted* the recorded images.[1] Because *recording* is the only manner of offense charged, Appellant has no standing to

[1] For example, Count 1 reads: "on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, **did by electronic means record another**, namely: RMG, P716098.AVI, hereinafter referred to as complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;". See Appendix B – Indictment (emphasis added).

challenge the entirety of the § 21.15(b)(1), and the lower court exceeded its prerogative in invalidating the whole subsection. Moreover, the lower court's analysis of the statute's constitutionality relied fundamentally on *broadcasts* and *transmits* provisions of the subsection, which are not properly at issue in this case.[2] Proper analysis should turn on whether the *recording* provision of § 21.15 is constitutional.

a. Photography is not inherently expressive conduct.

The protections of the *First Amendment* extend not only to "speech" in the verbal or written form but also to acts of expression. However, the scope of conduct protected by the First Amendment is limited to conduct intended to communicate an idea. *See Texas v.* Johnson, 491 U.S. 397, 405 (1989). In this case, the lower court held that "photography is a form of speech normally protected by the *First* Amendment." *Ex parte Thompson*, at page 7. The court went on to refer – without citation to authority – to a "right to photography." *Id.* at 10. The lower court's fundamental error is its assumption that photography is an inherently expressive act entitled to *First Amendment* protection.

[2] This is similar to the Fourth Court of Appeals' mistaken analysis in *Scott v. State*, 298 S.W.3d 264 (Tex. App. – San Antonio 2009). On discretionary review, this Court discerned, after "a careful reading," that the court of appeals erred in addressing the constitutionally of a portion of the Online Harassment Statute (Penal Code § 42.07) which was not implicated by the charging instrument. *Scott v.* State, 322 S.W.3d 662, 668 (Tex. Crim. App. 2010).

Although we tend to reflexively think of photography as a medium of expression, there is nothing inherently communicative about the act of making a visual record. Photography is essentially nothing more than making a chemical or electronic record of an arrangement of refracted electromagnetic radiation (light) at a given period of time. Whether that act is sufficiently communicative to invoke speech protections requires deeper analysis than the lower court's opinion offers. The State submits that such an analysis only possible as an as-applied challenge with a developed record, not a facial challenge as this.

In determining whether conduct is sufficiently communicative to implicate the *First Amendment*, courts must examine: (1) the nature of the communicative activity, (2) whether an intent to convey a particularized message was present, and (4) whether the likelihood was great that the message would be understood by those who viewed it. *Texas v. Johnson*, 491 U.S. 397, 404-405 (1989). Conduct is not expressive unless there is both (1) an "intent to convey a particularized message," and (2) "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington,* 418 U.S. 405, 410-11 (1974).[3]

[3] The particularized message need not be "a narrow, succinctly articulable message" in inherently expressive activities such as parades or publicly displayed art. *See Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

Applying this essential preliminary analysis to the act of making a visual record, it becomes clear that the mere act of photography is not inherently expressive because it is not necessarily communicative.[4] The act of visual *recording* prohibited by § 21.15(b)(1) does not contemplate any communicative conduct. Consequently, the statute – and particularly the *recording* provision – does not implicate *First Amendment* speech protections, and the lower court erred in striking down the entire statutory subsection on a facial constitutional challenge.[5]

b. The Improper Photography statute does not restrict communicative speech; it regulates conduct which invades the substantial privacy interests of another in an essentially intolerable manner.

A fair reading of Penal Code § 21.15(b)(1) reveals that the statute is not a restriction of speech but a regulation of conduct. This was recognized by the Fourteenth Court of Appeals in *Ex Parte Nyabwa,* 366 S.W.3d 719 (Tex. App. – Houston [14th Dist.] 2011, pet. ref'd). [6] The statute does not implicate the *First*

---

[4] One federal district court has recognized that the possibility "the act of photographing, in the abstract, is not sufficiently expressive or communicative and therefore not within the scope of *First Amendment* protection." *Pomykacz v. Borough of West Wildwood,* 438 F. Supp. 2d 504, 514 (D.N.J. 2006) (Concerning the photographing of public servants); *cited with approval by Kelly v. Borough of Carlisle,* 622 F.3d 248 (3rd Cir. 2010).

[5] If Appellant believes that Penal Code § 21.15(b)(1) has been unconstitutionally applied to his conduct, he may bring an *as applied* challenge after making a record of his conduct. *See Bynum v. State,* 767 S.W.2d 769, 773 (Tex. Crim. App. 1989)

[6] The 14th Court of Appeals withdrew this opinion and substituted a substantively identical one, however this Court reinstated the prior published opinion when it denied discretionary review.

Amendment's speech-content regulation concerns, because it "regulates a person's intent in creating a visual record and not the contents of the record itself." *Id.* at 726. In reaching this conclusion, the *Nyabwa* court adhered to this Court's holding in *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010) (upholding the *Harassment* statute), that communicative conduct that seeks to invade the substantial privacy interests of another in an essentially intolerable manner does not implicate *First Amendment* speech protections. As this Court stated:

> [W]e conclude that [the Harassment statute] is not susceptible of application to communicative conduct that is protected by the First Amendment. In other words, the statutory subsection does not implicate the free-speech guarantee of the First Amendment. The statutory 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. Given that plain text, we believe that the conduct to which the statutory subsection is susceptible of application will be, in the usual case, essentially noncommunicative, even if the conduct includes spoken words. That is to say, in the usual case, persons whose conduct violates [the statute] will not have an intent to engage in the legitimate communication of ideas, opinions, or information; they will have only the intent to inflict emotional distress for its own sake. **To the extent that the statutory subsection is susceptible of application to communicative conduct, it is susceptible of such application only when that communicative conduct 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.**
>
> 322 S.W.3d at 670 (emphasis added).

See. Ex Parte Nyabwa, 366 S.W.3d 710 (Tex. Crim. App. 2012) (Keller, P.J., dissenting)..

Analogously, the visual recording prohibited by the Penal Code § 21.15(b)(1) is not protected speech, because the elements of *lack of consent* and *specific sexual intent* effectively limit the scope of the regulated conduct too that which invades the privacy of another in an essentially intolerable manner.

In this case, the Fourth Court of Appeals attempted to justify its departure from this Court's reasoning in *Scott*. First, the lower court relied on the *broadcasting* and *transmitting* provisions § 21.15(b)(1) – which are not at issue in this case – to hold that the statute "regulates protected speech as opposed to 'noncommunicative' conduct." The lower court also held that the *Harassment* statute differed in that it required an intent to invade the personal privacy of another, whereas § 21.15(b)(1) does not. In making this holding, the lower court inexplicability ignored the statute's elements of *lack of consent* and *specific sexual intent* and their inherent implication of an invasion of privacy.

Next, the lower court held that the specific intent provision ("with the intent to arouse or gratify the sexual desire of any person") constitutes impermissible thought control, citing *Stanley v. Georgia*, 394 U.S. 557 (1969). The case cited is inapposite to that line of reasoning. In *Stanley*, the U.S. Supreme Court considered an as-applied challenge to a state obscenity conviction for the possession of obscene material in appellant's own home. Notably, the Supreme Court did not

strike down the obscenity statute as unconstitutional but held rather that the justifications for prohibiting the distribution of obscene materials do not permit "reach into the privacy of one's own home." *Id.* at 565. *Stanley* does not stand for the proposition that a legislature engages in "thought control" where it narrows a statute by requiring a specific sexual intent. Rather, the opinion recognized a narrow exception to the government's authority to regulate mere possession of obscenity within one's own home. *See United States v. Orito*, 413 U.S. 139, 141 (1973) ("It is hardly necessary to catalog the myriad activities that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public."). To label this specific intent as *impermissible thought control* perilously invites unintended consequences for many other Texas laws and casts seeds of confusion in the lower courts.[7]

---

[7] This particular phrase appears in a number of Texas criminal statutes. The lower court recognized this but distinguished § 21.15(b)(1) from other statutes with the circular locution that "those statutes criminalize unprotected, illegal activity." Apart from *Improper Photography*, the language "intent to arouse or gratify the sexual desire of another" may be found in:

- *Indecent Exposure* (Penal Code § 21.08) – Upheld by *McQueen v. State*, No. 05-02-1245, 7 (Tex. App. – Dallas 2003, pet. ref'd) (Not designated for publication), and *Mojica v. State*, No. 04-00-00570, 2001 Tex. App. LEXIS 4871 (Tex. App. – San Antonio 2001, no pet.) (Not designated for publication) (but reversing conviction on other grounds).
- *Indecency with a Child* (Penal Code § 21.11) – Upheld by *Sullivan v. State*, 986 S.W.2d 708 (Tex. App. – Dallas 1999) and *Stewart v. State*, 39 S.W.3d 230 (Tex. App. – Tyler 1999, pet. ref'd).
- *Civil Commitment of Sexually Violent Predators* (Health & Safety Code chap. 841) – Upheld by *In re Commitment of Miller*, 262 S.W.3d 877, 890 (Tex. App. – Beaumont 2008, pet denied).
- The regulation of massage establishments (Occ. Code chap. 455).
- The definition of "sexual contact" (Penal Code §§ 21.01(2) & 43.01(3)), incorporated by:

In *Scott*, this Court examined the text of Penal Code § 42.07(a)(4) and took note of several significant limiting features that removed the conduct from the concerns of the *First Amendment*:

> First, the text requires that the actor have the specific intent to harass, annoy, alarm, abuse, torment, or embarrass the recipient of the telephone call. That is, the text requires that the actor have the intent to inflict harm on the victim in the form of one of the listed types of emotional distress. Second, the text requires that the actor make repeated telephone calls to the victim; one telephone call will not suffice. Third, the text requires that the actor make those telephone calls in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend an average person. Fourth, the text does not require that the actor use spoken words.
>
> *Scott v. State*, 322 S.W.3d 662, 669 (Tex. Crim. App. 2010).

Examining the text of § 21.15(b)(1) similarly reveals limiting features which remove the conduct proscribed from *First Amendment* protections. First, § 21.15(b)(1) also contains an element of specific intent – "the intent to arouse or

---

  - *Continuous Sexual Abuse of Children* (Penal Code § 21.02)
  - *Public Lewdness* (Penal Code § 21.07)
  - *Improper Relationship Between Educator and Student* (Penal Code § 21.12)
  - *Online Solicitation of a Minor* (Penal Code § 33.021)
  - *Improper Sexual Activity with Person in Custody* (Penal Code § 39.04)
  - *Prostitution* (Penal Code § 43.02)
- The definition of "deviate sexual intercourse" (Penal Code §§ 21.01(1) & 43.01(1))
  - *Continuous Sexual Abuse of Children* (Penal Code § 21.02)
  - *Public Lewdness* (Penal Code § 21.07)
  - *Improper Relationship Between Educator and Student* (Penal Code § 21.12)
  - *Online Solicitation of a Minor* (Penal Code § 33.021)
  - *Improper Sexual Activity with Person in Custody* (Penal Code § 39.04)
  - *Prostitution* (Penal Code § 43.02)
  - *Prohibited Sexual Intercourse* (Penal Code § 25.02)

gratify the sexual desire of any person." Second, the statute requires that the visual recording be done without its subject's consent. Finally, the statute does not require – or even contemplate – that the actor use spoken words.

This Court recently addressed the distinction between protected *speech* and unprotected *conduct* while reviewing the constitutionality of the *sexually explicit communications* provision of the Penal Code § 33.021 (Online Solicitation of a Minor) in *Ex parte Lo*, __ S.W.3d __, No. PD-1560-12 (Tex. Crim. App. 2013).[8] In that opinion, this Court cogently recognized that the conduct governed by the *solicitation* provision of § 33.021(c) provided "an excellent contrast" to the speech-content regulated by the *sexually explicit communications* provision of § 33.021(b). *Id* at pages 6-8. This Court reasoned that, because "offers to engage in illegal transactions [such as sexual assault of a minor] are categorically excluded from *First Amendment* protection," "it is the conduct of requesting a minor to engage in illegal sexual acts that is the gravamen of the offense." *Id.*

Analogously, Penal Code § 21.15(b)(1) – by virtue of its limiting elements of *non-consent* and *specific sexual intent* – regulates only the conduct of recording, broadcasting, or transmitting images that fall outside *First Amendment* protections as intolerably invasive of the substantial privacy interests of another. This is the gravamen of the offense. Accordingly, the statute does not implicate the

[8] At the time of the filing of this brief, the disposition of the State's Motion for Rehearing in that case remains pending before the Court.

protections of the *First Amendment*, and the lower court erred in holding otherwise.

2. Alternatively, Penal Code § 21.15 is a valid content-neutral regulation of the time, place, and manner of speech.

The *First Amendment* prohibits the government from regulating speech in a manner that favors some viewpoints or ideas at the expense of others. *See Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984). However, the right of free speech "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *See Adderley* v. *Florida*, 385 U.S. 39, 47-48 (1966). All forms of speech are subject to reasonable content-neutral restrictions. *See Grayned* v. *City of Rockford*, 408 U.S. 104 (1972).

After holding that Penal Code § 21.15 implicated the *First* Amendment, the lower court proceeded to ask whether the statute was a content-based or content-neutral regulation. The lower court determined that § 21.15(b)(1) was content-neutral and accordingly subjected the statute to the intermediate scrutiny test of *United States v. O'Brian*, 391 U.S. 367, 376 (1968). Ultimately, the lower court held that – although the State has "an important interest in protecting its citizens from covert photography that may invade their privacy" – the statute was

impermissibly overbroad because it "would potentially penalize some speech." *Ex Parte Thompson* at 10.

Should this Court hold that the Appellant has met his burden to show the implication of constitutional protections, the State would aver in the alternative that § 21.15 is a permissible content-neutral regulation. The lower court erred in holding the statute overbroad, because Penal Code § 21.15(b)(1) does not include in its sweep a substantial amount of protected conduct.

a. Penal Code § 21.15 is content-neutral.

"[T]he principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of an agreement or disagreement with the message it conveys." *Turner Brod. Sys. v. F.C.C.*, 512 U.S. 622, 642 (1994) (internal citations and quotations omitted). The lower court correctly held that Penal Code § 21.15 is a content-neutral and not a content-based regulation. Because §21.15(b)(1) does not limit the substantive content of visual recordings nor favor one type of photograph over another, the statute is content-neutral and subject, at most, to intermediate scrutiny.

b. Penal Code § 21.15 serves legitimate and important government interests.

The lower court correctly recognized that the State has a legitimate interest in protecting individuals from invasive covert photography, however the interest advanced by the Improper Photography statute does not end there. The government also has an interest in protecting individuals from having their images unconsensually exploited for the sexual gratifications of others.

The privacy protections afforded by the Constitution only restrict government intrusion into the lives of individuals. The Constitution places no restrictions on invasions of a person's privacy by non-governmental individuals and entities. Consequently, it is the responsibility of legislatures to enact laws demarcating the boundaries of privacy between individuals and entities. When such lines are drawn by a representative government, they will reflect the prevailing societal values concerning privacy. Penal Code § 21.15(b)(1) exists not merely to protect persons from covert photography but to also to protect them from being made the unwilling recorded subjects for others' sexual fantasies. As the lower court noted:

> In 2003, the Legislature amended the statute and clarified its intent to protect non-consenting individuals from an offensive invasion of their privacy. *See* Acts of 2003, 78th Leg. R.S., ch. 500, § 1, 2003 TEX. GEN. LAWS 1771; *see also* HOUSE COMM ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 1060, 78th Leg, R.S. (2003).
>
> *Ex parte Thompson*, at 8-9.

When the full scope of interests served by the Improper Photography statute are considered, it is evident that the limiting elements of the statute – *non-consent* and *specific sexual intent* – sufficiently narrow its scope to advance those interests.

3. Penal Code § 21.15 is not unconstitutionally overbroad because it does not include within its sweep a substantial amount of protected conduct.

A statute may be impermissibly overbroad if – in addition to proscribing activities unprotected by the constitution – it sweeps within its coverage speech or conduct that is protected by the *First Amendment*. *See Clark v. State*, 665 S.W.2d 476, 482 (Tex. Crim. App. 1984). But a statute may not be invalidated as overbroad unless it reaches a *substantial amount* of constitutionally protected conduct. *Bynum v. State*, 767 S.W.2d 769, 772 (Tex. Crim. App. 1989). Where conduct – and not merely speech are involved, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *See Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799-800 (1984). [T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Id.* at 800. "Invalidation for overbreadth is strong medicine that is not to be casually employed." *U.S. v. Williams*, 553 U.S. 285, 293 (2008). "A statute that prohibits intentional conduct is rarely subject to a facial overbreadth challenge." *Sullivan v. State*, 986 S.W.2d 708, 712 (Tex. App. –

Dallas 1999, *no pet.*); citing *United States v. National Dairy Prods. Corp.*, 372 U.S. 29 (1963). In an overbreadth analysis, the reviewing court should being with the presumption of constitutionality and hold the challenging party to his burden to establish unconstitutionality. *See Rodriguez v. State,* 93 S.W.3d 60, 69 (Tex. Crim. App. 2002).

In striking down § 21.15(b)(1) as unconstitutionally overbroad, the lower court held that "the application of the statute would potentially penalize *some* protected speech." *Ex Parte Thompson*, at 10 (emphasis added). This is simply not the standard to be applied in an overbreadth analysis, which requires Appellant to demonstrate that the statute encompasses a *substantial amount of protected conduct* to be invalidated as overbroad.

The lower court went on to describe the statute as "virtually unbounded in its potential application." *Ex Parte Thompson* at 10. However, this analysis of the lower court fatally ignores the limiting elements of *non-consent* and *specific sexual intent* which operate to exclude any substantial amount of legitimate (i.e. consensual and/or non-sexually exploitive) visual recordings. The lower court's analysis seems to assume that some express or formal consent must be obtained from the subject of the image. However, "consent" – as an element of a criminal

offense – may be given either expressly or implicitly by the subject party.[9] Persons who go out into the public necessarily consent to some measure of public view, and the boundaries of that consent are dictated by the circumstances. For example, an individual who wears a revealing swimsuit to a public beach has consented to a scope of public view that may encompass a photographer standing down the beach, whereas the same individual wearing a skirt to the supermarket cannot be said to consent to another attempting to photograph her from beneath the hem of her skirt. The lower court's failure to recognize how the element of *non-consent* substantially limits the scope of the statute's application leads to its mistaken observation that the statute is "virtually unbounded in its potential application," and ultimately results in the court's erroneous conclusion that the statute is unconstitutionally overbroad.

The scope of Penal Code § 21.15(b)(1)'s application is further limited by the requirement that the State prove a defendant acted with the specific "intent to arouse or gratify the sexual desire of any person." This specific intent – working in conjunction with the other elements of the offense – precludes application of the law to the broad range of protected conduct imagined by the lower court.

---

[9] Penal Code § 1.07(a)(11) defines "Consent" as "assent in fact, whether express of apparent," incorporating concepts of implied and manifest intent. *See Baird v. State*, 398 S.W.3d 220 (Tex. Crim. App., 2013) (confirming that intent need not be expressly given under 1.07(a)(11)'s definition).

As argued *supra*, the Penal Code § 21.15(b)(1) regulates not speech but conduct coupled with a specific sexual intent. By including the elemental requirements of *lack of consent* and *intent to arouse or gratify sexual desire*, the legislature tailored § 21.15 to avoid encompassing any substantial amount of protected conduct.

The *Improper Photography* statute is not unconstitutionally overbroad, because it does not reach a substantial amount of *First Amendment* protected conduct. Accordingly, the lower court erred in striking down the § 21.15 and should be reversed.

VII. CONCLUSION AND PRAYER

By the foregoing reasons and authorities, the Fourth Court of Appeals erred in striking down Penal Code § 21.15(b)(1) as unconstitutionally overbroad. Accordingly, the State prays this Honorable Court reverse the lower court and remand this case for proceedings consistent with the law.

Respectfully submitted,

Hon. Susan D. Reed
Criminal District Attorney
Bexar County, Texas

By: _____

S. Patrick Ballantyne
Assistant Criminal District Attorney
Bexar County, Texas
State Bar # 24053759
101 W. Nueva St., 7th floor
San Antonio, Texas 78205
210-335-2404 (phone)
210-335-2773 (facsimile)
sballantyne@bexar.org

CERTIFICATION OF WORD COUNT

The undersigned counsel certifies, pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), that the State's Brief on Remand filed this day contains 5,658 words. Counsel relies for his certification on the word count of the computer program used to prepare this document: Microsoft Word.

S. Patrick Ballantyne

CERTIFICATE OF SERVICE

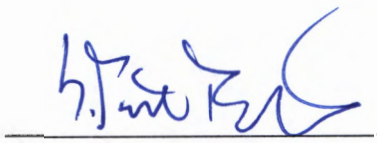
I, S. Patrick Ballantyne, hereby certify that a true and correct copy of this Response was transmitted this 13th day of January, 2014, to Donald H. Flanary, III, attorney of record for the Applicant, by the following method:

_____ Hand delivery.

_____ Facsimile transmission to number _____,

___X___ Electronic mail to _____donflanary@hotmail.com_____.

___X___ Certified Mail, U.S.P.S.



S. Patrick Ballantyne

APPENDIX A

OPINION OF THE FOURTH COURT OF APPEALS
EX PARTE RONALD THOMPSON
NO. 04-13-00127-CR

Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-13-00127-CR

EX PARTE Ronald **THOMPSON**

From the 379th Judicial District Court, Bexar County, Texas
Trial Court No. 2012-CR-1148-W2
The Honorable Ron Rangel, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Catherine Stone, Chief Justice
Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: August 30, 2013

REVERSED AND REMANDED

Appellant Ronald Thompson was arrested and charged with twenty-six counts of improper photography or visual recording in violation of section 21.15(b)(1) of the Texas Penal Code, commonly known as the "improper photography" statute. This is an appeal from the trial court's denial of Thompson's pretrial application for writ of habeas corpus, which alleged section 21.15(b)(1) is unconstitutional on its face because it violates both the First Amendment to the U.S. Constitution and Article 1, Section 8 of the Texas Constitution. We reverse and remand.

BACKGROUND

Because this appeal presents a facial challenge to a statute, a detailed rendition of the facts is unnecessary for its disposition. We therefore provide only a brief procedural history.

On July 16, 2011, Thompson was arrested and charged with improper photography. On January 22, 2013, Thompson filed a pre-trial "Application for Writ of Habeas Corpus Seeking Relief from Facially Unconstitutional Statute."

On January 25, 2013, the trial court denied Thompson's application for writ of habeas corpus without a hearing. On March 7, 2013, the trial court issued an order clarifying that it considered and denied Thompson's application based on the merits. Thompson then perfected this appeal.

ANALYSIS

Section 21.15(b)(1) of the Texas Penal Code provides as follows:

> A person commits an offense if the person: (1) photographs or by videotape or other electronic means records, broadcasts, or transmits a visual image of another at a location that is not a bathroom or private dressing room: (A) without the other person's consent; **and** (B) with intent to arouse or gratify the sexual desire of any person.

TEX. PENAL CODE ANN. § 21.15(b)(1) (West 2011) (emphasis added). Thompson argues this section of the penal statute is facially unconstitutional because it: (1) impermissibly regulates the content of speech, and is both (2) overly broad and (3) vague. Therefore, Thompson contends the statute violates the First Amendment to the U.S. Constitution and Article 1, Section 8 of the Texas Constitution.[1]

Standard of Review

A claim that a statute is unconstitutional on its face may be raised by a pretrial writ of habeas corpus. *Ex Parte Weise*, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001). Habeas corpus pre-

[1] Thompson does not argue or provide authority establishing that his protection under the Texas Constitution exceeds or differs from that provided to him by the U.S. Constitution. Therefore, we only address his federal claim. *See Arnold v. State*, 873 S.W.2d 27, 33 (Tex. Crim. App. 1993).

conviction proceedings are separate criminal actions, and the applicant has the right to an immediate appeal before trial begins. *Greenwell v. Court of Appeals for the Thirteenth Judicial Dist.*, 159 S.W.3d 645, 650 (Tex. Crim. App. 2005).

We review a trial court's decision to grant or deny an application for writ of habeas corpus under an abuse of discretion standard. *See Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006); *Ex parte Perusquia*, 336 S.W.3d 270, 274 (Tex. App.—San Antonio 2010, pet. ref'd); *Ex parte Nyabwa*, 366 S.W.3d 719, 723 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).[2,3] However, when the trial court's ruling and determination of the ultimate issue turns on the application of the law, such as the constitutionality of a statute, we review the trial court's ruling de novo. *Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), *overruled in part on other grounds by Ex parte Lewis*, 219 S.W.3d 335, 371 (Tex. Crim. App. 2007); *Ex parte Perusquia*, 336 S.W.3d at 275; *Nyabwa*, 366 S.W.3d at 723 (citing *Rivera v. State*, 363 S.W.3d 660, 666 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

---

[2] We note the 14th Court of Appeals in *Nyabwa* attempted to withdraw its December 13, 2011 opinion and issue another one on February 7, 2012. *See Ex Parte Nyabwa*, 366 S.W.3d 710, 711 (Tex. Crim. App. 2012) (per curiam). However, the Texas Court of Criminal Appeals held the February 2012 opinion was untimely and unauthorized under Rule 68.7 of the Texas Rules of Appellate Procedure, and ordered the court to reinstate the original judgment and December 2011 opinion. *See id.* at 712. *Nyabwa* is the only published case that has addressed and upheld the constitutionality of the "improper photography" statute. *See* 366 S.W.3d at 723. There are, however, two unpublished cases that upheld the constitutionality of the statute prior to *Nyabwa*. *See Vasquez v. State*, No. 05-06-00486-CR, 2007 WL 1054146 (Tex. App.—Dallas April 10, 2007, pet. ref'd); *State v. Calvo*, No. 08-05-00002-CR, 2006 WL 2634733 (Tex. App.—El Paso Sept. 14, 2006, pet. ref'd). The Texas Court of Criminal Appeals refused discretionary review in all three cases. In relation to *Nyabwa*'s petition, Presiding Judge Keller wrote a dissenting opinion, stating she would have "grant[ed] review to address whether the statute violates the First Amendment." *See Nyabwa*, 366 S.W.3d at 712 (Keller, P.J., dissenting).

[3] After pleading guilty to three counts of improper photography in state court, Nyabwa filed a federal habeas petition requesting the district court strike his conviction on grounds that section 21.15(b)(1) of the Texas Penal Code violates the U.S. Constitution. *See Nyabwa v. Thaler*, No. H-12-1152, 2012 WL 4434733, at *1 (S.D. Tex. Sept. 22, 2012). The district court dismissed Nyabwa's petition, holding he had not exhausted his state remedies, and denied a certificate of appealability holding Nyabwa "ha[d] not made a substantial showing that reasonable jurists would find the Court's [] ruling debatable." *Id.* at *2. The Fifth Circuit vacated the district court's judgment, and remanded to the district court, holding Nyabwa exhausted his state remedies, and granted a certificate of appealability holding "the district court pleadings, the record, and the COA application demonstrate[d] that reasonable jurists could debate whether [Nyabwa] has made a valid claim of a constitutional deprivation." *Nyabwa v. Stephens*, No. 12-20682, 2013 WL 3091894, at *1 (5th Cir. June 20, 2013).

We review the constitutionality of a criminal statute de novo. *Byrne v. State*, 358 S.W.3d 745, 748 (Tex. App.—San Antonio 2011, no pet.). When a statute is attacked upon constitutional grounds, we ordinarily presume the statute is valid and that the legislature has not acted unreasonably or arbitrarily. *State v. Rosseau*, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013). The burden rests upon the individual who challenges the statute to establish its unconstitutionality. *Id.*

However, when the government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded to legislative enactments is reversed. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817 (2000); *Nyabwa*, 366 S.W.3d at 724. Content-based regulations are presumptively invalid, and the government bears the burden to rebut that presumption. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004); *Nyabwa*, 366 S.W.3d at 724.

First Amendment Implications: Does the Statute Regulate Protected Speech?

The free speech protections of the First Amendment are implicated when the government seeks to regulate protected speech or expressive conduct. *See Scott v. State*, 322 S.W.3d 662, 668–69 (Tex. Crim. App. 2010). It is the obligation of the person desiring to engage in allegedly expressive conduct to demonstrate the First Amendment applies. *Clark v. Comty. For Creative Non-Violence*, 468 U.S. 288, 294 (1984).

Thompson contends the improper photography statute regulates protected speech by imposing limits on non-obscene photography of a sexual nature. The U.S. Supreme Court has held photography is a form of speech normally protected by the First Amendment. *United States v. Stevens*, 559 U.S. 460, 130 S.Ct. 1577, 1584, *passim* (2010); *Regan v. Time, Inc.*, 468 U.S. 641, 648, *passim* (1984). Furthermore, sexual expression that is indecent but not obscene is also protected by the First Amendment. *See Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).

The court in *Nyabwa* held section 21.15(b)(1) of the Texas Penal Code was "not a regulation of speech or expression, but rather of the intent of the photographer."[4] In reaching its holding, the court discussed *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010), where the court of criminal appeals concluded a telephone harassment statute did not implicate the free speech guarantee, even though the conduct included spoken words, where the statute focused on the actor's intent to inflict emotional distress and not to legitimately communicate ideas, opinions, or information. *See Nyabwa*, 366 S.W.3d at 725–26. The court held that in the same way, the improper photography statute regulates a person's intent in creating a visual record and not the contents of the record itself. *See id.* at 726. We respectfully disagree.

First, we hold the statute addressed in *Scott* is distinguishable from the improper photography statute. In *Scott*, the court held the telephone statute did not implicate the free speech guarantee of the First Amendment because it was directed only at persons 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." 322 S.W.3d at 670. The court held the statute regulated "noncommunicative" conduct because it did not include "an intent to engage in the legitimate communication of ideas, opinions, or information; [it] will have only the intent to inflict emotional distress for its own sake." *Id.* In other words, it was the lack of a legitimate intent to communicate which made the conduct regulated "noncommunicative." *See id.*

In contrast, we hold the statutory subsection challenged by Thompson, section 21.15(b)(1) of the Texas Penal Code, regulates protected speech as opposed to "noncommunicative" conduct.

[4] Although the court held the statutory subsection did not regulate speech, the opinion states: "Texas Penal Code section 21.15(b) neither limits photography because of the ideas expressed nor favors one type of photograph over another; therefore, the statute is content-neutral." *See Nyabwa*, 366 S.W.3d at 725. As a result, the court seemingly agrees the statute regulates speech, that is, photography, but does it in a "content neutral" manner. *See id.*

The statute specifically restricts an individual from taking, recording, broadcasting, or transmitting photographs of others in public places—places other than a bathroom or private dressing room—when the individual has the intent to "arouse" or "gratify" someone's sexual desires. *See* TEX. PENAL CODE ANN. § 21.15(b)(1). Therefore, the statute not only restricts an individual's right to photograph, a form of speech protected by the First Amendment, *see Stevens*, 130 S.Ct. at 1584, but the statute also restricts a person's thoughts, which the U.S. Supreme Court has held is "wholly inconsistent with the philosophy of the First Amendment." *See Stanley v. Georgia*, 394 U.S. 557, 565–66 (1969) (holding government does not have right to control moral content of person's thoughts).

Furthermore, unlike the statute in *Scott*, subsection 21.15(b)(1) does not require an "intent" to "invade another person's personal privacy." *See Scott*, 322 S.W.3d at 669. In fact, that requirement is found in subsection 21.15(b)(2)—which penalizes an individual taking photographs with the intent to "invade the privacy of the other person"—but is not found in subsection 21.15(b)(1). *Compare* TEX. PENAL CODE ANN. § 21.15(b)(1) (requiring individual have intent to arouse or gratify sexual desire of any person) *with* TEX. PENAL CODE ANN. § 21.15(b)(2) (requiring individual have intent to invade privacy of another person *or* arouse or gratify sexual desire of any person) (emphasis added). Subsection 21.15(b)(1) does not require the person being photographed even be aware of it. Therefore, unlike the statute in *Scott*, which regulated "noncommunicative" conduct (without the legitimate intent to communicate but rather to "inflict emotional distress"), we hold subsection 21.15(b)(1) restricts protected speech by regulating an individual's right to photograph and to have certain thoughts. We also hold the intent requirement, i.e., to have the "intent to arouse or gratify the sexual desire of any person," does not render the speech or conduct regulated "noncommunicative" or unprotected. As Presiding Judge Keller mentioned, "the type

of intent [the statute] regulates [does] not inherently exempt it from First Amendment protection." *See Nyabwa*, 366 S.W.3d at 712.

Does the Statute Regulate Speech in a Content-Based or Content-Neutral Manner?

We must now determine whether the statute regulates speech in a content-based or content-neutral manner. As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based, whereas laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are content neutral. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). Courts review content-based laws that suppress, disadvantage, or impose differential burdens on speech because of its content under a strict scrutiny standard. *Id.* To uphold content-based laws under this standard, the government must show: (1) the restriction is necessary to serve a compelling state interest, and (2) the law is narrowly drawn to achieve that end. *Martinez v. State*, 323 S.W.3d 493, 504 (Tex. Crim. App. 2010).

In contrast, content-neutral laws that govern expression but do not seek to restrict its content are subject to intermediate scrutiny. *Turner*, 512 U.S. at 642. The U.S. Supreme Court in *United States v. O'Brien* set out a four-part test to determine whether content-neutral restrictions on protected speech are constitutional and valid under the First Amendment. *See* 391 U.S. 367, 377 (1968); *Foster v. City of El Paso*, 396 S.W.3d 244, 253 (Tex. App.—El Paso 2013, no pet.) Under this test, restrictions that are content neutral in time, place and manner are valid, even if they cause an adverse impact on the exercise of First Amendment rights, provided: (1) they are within the constitutional power of the government; (2) they further an important or substantial governmental interest; (3) the asserted governmental interest is unrelated to the suppression of free expression; and (4) the incidental restrictions on alleged First Amendment freedoms are no greater

than is essential to the furtherance of that interest. *Rivera*, 363 S.W.3d at 667 n. 7 (quoting *O'Brien*, 391 U.S. at 377).

Thompson argues subsection 21.15(b)(1) is a content-based restriction because it limits the type of communication that can be conveyed. However, we hold the plain language of the subsection 21.15(b)(1) does not "limit" or "restrict" the substantive content of photographs—in other words, it does not favor one type of photograph over another. *See Turner*, 512 U.S. at 642. Rather, the statute limits speech by imposing time, place, and manner restrictions that are unrelated to content. *See Clark*, 468 U.S. at 293. Accordingly, we hold subsection 21.15(b)(1) regulates speech in a content-neutral manner, requiring intermediate scrutiny. *See id.*

Does the Statute Reach a Substantial Amount of Constitutionally Protected Conduct?

Having held the statute regulates speech in a content neutral manner, we must now determine whether the statute meets the four-part *O'Brien* test. *See Combs v. Tex. Entm't Ass'n*, 347 S.W.3d 277, 286 (Tex. 2011); *Foster*, 396 S.W.3d at 253.

Thompson contends the statute does not meet any of the factors in the *O'Brien* test.[5] First, Thompson argues the Legislature did not have power to enact the improper photography statute because, as written, the statute violates First Amendment protections and is void on its face. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."). Thompson also contends the State does not have an important governmental interest in enacting the statute. The statute's legislative history shows the Legislature's intent in enacting Section 21.15 of the Penal Code was to create "an offense prohibiting the covert photography or visual recording of another for an improper sexual purpose." *See* Acts of 2001, 77th Leg., R.S., ch. 458,

[5] Although Thompson did not explicitly address the *O'Brien* factors in his briefing, we liberally construe his arguments as they apply to the *O'Brien* test. *See Burnett v. Sharp*, 328 S.W.3d 594, 598 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding court must construe pleading liberally in pleader's favor and construe petition to include all claims that reasonably may be inferred from language used in petition).

§ 1, 2001 Tex. Gen. Laws 893; *see also* HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 73, 77th Leg., R.S. (2001). In 2003, the Legislature amended the statute and clarified its intent to protect non-consenting individuals from an offensive invasion of their privacy. *See* Acts of 2003, 78th Leg., R.S., ch. 500, § 1, 2003 TEX. GEN. LAWS 1771; *see also* HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 1060, 78th Leg., R.S. (2003). We hold the government has an important interest in protecting its citizens from covert photography that may invade their expectation of privacy. *See id.*

Thompson also challenges the third and fourth *O'Brien* factors—the statute's governmental interest suppresses free expression, and the statute significantly restricts alleged First Amendment freedoms. *See O'Brien*, 391 U.S. at 377. Specifically, Thompson argues the statute is "not sufficiently narrow . . . to bring it into the realm of constitutionality." *See Olvera v. State*, 806 S.W.2d 546, 550 (Tex. Crim. App. 1991) (en banc) (citing *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983)) (holding restrictions embodied in content neutral statute must be narrowly tailored to serve significant government interest while leaving open sufficient alternative channels of communication).

Thompson contends the statute is not narrowly tailored to serve an important government interest, but is overbroad and vague. Thompson argues the statute would criminalize the generally accepted or legal conduct of photographing or videotaping a person without the subject's consent. For example, Thompson points to sexually arousing photographs of celebrities taken by paparazzi or photographs taken of "a fully-clothed adult walking down a public street." *See Nyabwa*, 366 S.W.3d at 712. Because Thompson contends the statute is both unconstitutionally overbroad and vague, we address the overbreadth challenge first. *See Roberts v. State*, 278 S.W.3d 778, 790 (Tex. App.—San Antonio 2008, pet. ref'd); (citing *Duncantell v. State*, 230 S.W.3d 835, 843 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd).

A statute is impermissibly overbroad if, in addition to proscribing activities that may be constitutionally prohibited, it sweeps within its coverage speech or conduct protected by the First Amendment. *Bynum v. State*, 767 S.W.2d 769, 772 (Tex. Crim. App. 1989) (en banc); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Therefore, this court must determine whether the statute reaches a substantial amount of constitutionally protected conduct—that is, whether "a substantial number of [the statute's] applications are unconstitutional judged in relation to the statute's plainly legitimate sweep." *See Stevens*, 559 S.Ct. at 1587 (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n. 6 (2008)); *see also Village of Hoffman Estates*, 455 U.S. at 494. If it does not, the overbreadth challenge must fail. *Id.*

The First Amendment prohibits laws that abridge freedom of speech. U.S. CONST. amend. I. Thompson argues the statute has a substantial impact on free speech because there is no careful delimitation of criminal conduct, but rather anyone who takes photographs of non-consenting persons is at risk of violating the law. We agree.

We first hold the application of the statute would potentially penalize some protected speech. The State contends the mere fact that we can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. *See Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Some courts have held a statute that prohibits intentional conduct is rarely subject to a facial overbreadth challenge. *See Sullivan v. State*, 986 S.W.2d 708, 712 (Tex. App.—Dallas 1999, no pet.). However, we hold this statute is different from other intentional conduct statutes in that it is "virtually unbounded in its potential application," *see Nyabwa*, 366 S.W.3d at 711 (Keller, P.J., dissenting), and constitutes a substantial restriction on protected conduct. *See Bynum*, 767 S.W.2d at 774.

The 14th Court of Appeals held in *Nyabwa*, and the State argues in this case, that the specific intent requirement in the improper photography statute renders the statute constitutional for First Amendment purposes. The State points out that statutes with the "intent to arouse or gratify the sexual desire of any person" requirement have been upheld. *See, e.g., Byrum v State*, 762 S.W.2d 685, 687–88 (Tex. App.—Houston [14th Dist.] 1988, no pet.); *see also Nyabwa*, 366 S.W.3d at 727. However, the difference between the improper photography statute and the statutes that include the same intent requirement is that those statutes criminalize unprotected, illegal activity, whereas section 21.15(1)(b) of the Texas Penal Code interferes with a person's protected freedoms under the First Amendment, including the right to photography and to have unregulated thoughts. *E.g.*, *compare Byrum*, 762 S.W.2d at 687 (upholding statute that prohibits touching of body parts defined by their anatomical names, if touching is done with specific intent to arouse or gratify any person's sexual desire) *with Nyabwa*, 366 S.W.3d at 711–12 (Keller, P.J., dissenting) (noting improper photography statute interferes with photography, recognized form of expression protected by First Amendment, and statute's intent requirement interferes with protection of freedom of thought, including freedom to think sexual thoughts).

"Broad prophylactic rules in the area of free expression are suspect . . . [p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Thompson contends the statute requires law enforcement officers to make subjective judgments regarding the photographer's intent. In other words, Thompson argues innocent photographers run the risk of being charged with violating the statute because the government is attempting to regulate thought, a freedom protected by the First Amendment. *See Stanley*, 394 U.S. at 565–66 (1969). We agree.

It is not enough to say a statute is not overbroad simply because it is directed at conduct with intent, if the intent portion of the statute regulates freedoms protected by the First

Amendment. Furthermore, the location identifier of subsection 21.15(b)(1)—at a location that is not a bathroom or private dressing room—is so broad the statute seems to criminalize conduct in areas where individuals have no expectation of privacy. *See, e.g., Katz v. United States*, 389 U.S. 347 (1967); *Liebman v. State*, 652 S.W.2d 942, 946 (Tex. Crim. App. 1983) (en banc).

Accordingly, we hold subsection 21.15(b)(1) of the Texas Penal Code does not survive intermediate scrutiny, and is void on its face because the statute is overbroad, reaching a substantial amount of constitutionally protected conduct. *See Stevens*, 559 S.Ct. at 1587.[6]

CONCLUSION

Based on the foregoing, we hold subsection 21.15(b)(1) of the Texas Penal Code is void on its face as it fails intermediate scrutiny and violates the First Amendment to the U.S. Constitution because it is overbroad. Accordingly, we reverse the trial court's denial of Thompson's application for writ of habeas corpus and remand this matter to the trial court to enter an order dismissing the prosecution, i.e. all charges against Thompson on alleged violations of section 21.15(b)(1) of the Texas Penal Code. *See Long v. State*, 931 S.W.2d 285, 297 (Tex. Crim. App. 1996) (en banc) (holding statutory provision is unconstitutionally vague on its face and remanding case to trial court to enter order dismissing prosecution).

Marialyn Barnard, Justice

Publish

[6] Based on this court's holding on the speech content and overbreadth issues, we need not reach the issue of vagueness.

APPENDIX B

INDICTMENT OF RONALD THOMPSON
379TH DISTRICT COURT, BEXAR COUNTY
NO. 2012-CR-1148

Defendant: RONALD THOMPSON JR
JN #: 1479206-1

STATE'S COPY

FILED
_____ O'CLOCK _____ M
FEB 13 2012
DONNA KAY McKINNEY
DISTRICT CLERK
BEXAR COUNTY, TEXAS
BY _____ DEPUTY

Address: 2734 CAROLYN ST, ASHLAND, KY 41102-6012

Complainant:

CoDefendants:

Offense Code/Charge: 361501 - IMPROPER PHOTOGRAPHY / VISUAL RECORDING

GJ: 543639 **PH Court:** 379
Court #: 379th **SID #:**973647 **Cause #:** 2012-CR-1148
Witness: State's Attorney

TRUE BILL OF INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS, the Grand Jury of Bexar County, State of Texas, duly organized, empanelled and sworn as such at the January term, A.D., 2012, of the 144th Judicial District Court of said County, in said Court, at said term, do present in and to said Court that in the County and State aforesaid, and anterior to the presentment of this indictment:

Count 1

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: RMG, P716098.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 2

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: JMM, P716092. AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 3

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: RMG, P716092.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 4

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: an unknown young female in water park with a black, pink, blue, and purple striped bikini in water park, P716088.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Defendant: RONALD THOMPSON JR
JN #: 1479206-1

Count 5

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: an unknown female in brown and pink bathing suit in water park, P716089.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 6

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: unknown female under water in a white bikini with blue and purple poke a dots, P716090.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 7

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: an unknown female under water in a white bikini with blue and purple poke a dots, P716091, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 8

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: an unknown female under water in a dark blue, light blue and white striped bikini, P716093.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 9

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: an unknown female under water with dark blue, light blue, and white striped bikini, P176094.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 10

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: RMG, P716095.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Defendant: RONALD THOMPSON JR
JN #: **1479206-1**

Count 11

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: JMM, P716095. AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 12

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: RJG, P716095.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 13

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: unknown female under water with yellow and white poke a dot bikini and yellow life jacket with orange straps, P716097.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 14

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: RMG, P716097.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 15

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: JMM, P716097.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 16

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: a unknown female under water in a solid yellow bikini, P7160106.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 17

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, at a location that was a bathroom or private dressing room, did by electronic means record another, namely: an unknown female at a water park in a blue bikini with a lime green peace sign on the buttocks, P7160112.AVI, hereinafter called complainant, without the complainant's consent and with intent to arouse and gratify the sexual desire of THE DEFENDANT;

Defendant: RONALD THOMPSON JR
JN #: 1479206-1

Count 18

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: an unknown female at a water park in a white bikini with pink poke a dots, P7160112.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 19

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: an unknown female at a water park with a white bikini with pink poke a dots, P7160114.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 20

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: an unknown female under water in a blue, brown, yellow and orange stripped bikini, P7160006.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 21

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: an unknown female under water in a light blue floral one piece bathing suit, P7160011.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 22

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: an unknown female under water in a multi-colored bikini, P7160016.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 23

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: an unknown female under water in black and white stripped bikini with a black peace sign on her right breast, P7160017.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 24

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: an unknown female under water in a red and white stripped bikini with a blue tie around her waist, P7160019.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Defendant: RONALD THOMPSON JR
JN #: **1479206-1**

Count 25

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: an unknown female under water with a multi-colored checkered bikini, P7160023.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

Count 26

on or about the 16th Day of July, 2011, RONALD THOMPSON JR, hereinafter referred to as defendant, with intent to arouse and gratify the sexual desire of THE DEFENDANT, did by electronic means record another, namely: an unknown female under water in a pink and purple bikini with white peace signs, P7160026.AVI, hereinafter called complainant, without the complainant's consent and at a location that was not a bathroom or private dressing room;

AGAINST THE PEACE AND DIGNITY OF THE STATE.

_____
Foreman of the Grand Jury