No. 22-980

In The

Supreme Court of the United States

NEIL NOBLE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
For The Fifth District Of Texas At Dallas

PETITION FOR WRIT OF CERTIORARI

NEIL NOBLE, Pro Se
11138 Joymeadow Dr.
Dallas, TX 75218
(214) 707-0722
Neil.noble@sbcglobal.net

QUESTIONS PRESENTED

A. Indictment

A(1). Notice Is a Fundamental Federal Constitutional Right

Is the Sixth Amendment right to be informed of the nature and cause of the accusation a fundamental federal constitutional right that should be made applicable to proceedings in state courts through the Fourteenth Amendment?

Should lack of sufficient notice of the nature and cause of the accusation under the Sixth Amendment be made constitutional error requiring proof beyond a reasonable doubt that the lack of notice was harmless?

Should lack of sufficient notice of the nature and cause of the accusation under the Sixth Amendment be made structural error requiring reversal without a harmless error analysis?

A(2). More Precise Notice

Are obscenity, harassment, and/or stalking cases classes of cases where more specific pleading should be required than merely repeating the language of the statute? Should the precise comments alleged to be obscene, harassing, or threatening be set-out on the face of the indictment?

QUESTIONS PRESENTED – Continued

A(3). Variances Between Indictment and Trial

Is the Fifth Amendment right to a grand jury indictment in felony cases a fundamental federal constitutional right that should be made applicable to proceedings in state courts through the Fourteenth Amendment?

Should a material variance between the allegations in the indictment and the proof at trial be made constitutional error for lack of notice requiring proof beyond a reasonable doubt that the variance was harmless?

A(4). Indictment Insufficient in This Case

Did the indictment provide sufficient notice of the nature and cause of the accusation in order to prepare a defense?

Should the State have been required to provide more precise notice in response to the Motion to Quash Noble filed? Should the State have been required to provide notice they were relying on the solicitation provision of the obscenity provision of the harassment statute? (42.07(a)(1), 42.07(b)(3)) Should the State have been required to provide more precise notice of the comments alleged to be obscene, harassing or threatening?

Was there a fatal variance between the allegations in the indictment and the evidence at trial? Is evidence pertaining to events not properly plead in the indictment inadmissible at trial? Should the admission of

QUESTIONS PRESENTED – Continued

such variance evidence be reviewed on appeal under TRAP 44.2(b) as a variance affecting the substantial rights of the defendant?

B. Constitutionality of Texas Harassment and Stalking Statutes

B(1). Stalking, 42.072

Is the Texas Stalking Statute, Penal Code § 42.072, unconstitutional, in whole or in part? Is § 42.072 unconstitutionally overbroad or vague, either on its face or as applied to Noble? Do any provisions of the Texas Harassment Statute, Penal Code § 42.07, render the § 42.072 unconstitutional?

Did the 2013 Amendment to § 42.072 which added an offense under § 42.07 as an element of § 42.072(a)(1) render § 42.072 unconstitutional by allowing essentially the same behavior to be prosecuted as either a Class B Misdemeanor (up to 6 months) or a Third Degree Felony (2 to 10 years), either on its face or as applied to Noble?

Is the "knows or reasonably should know" provision of Penal Code § 42.072(a)(1) unconstitutionally overbroad or vague, either on its face or as applied to Noble?

QUESTIONS PRESENTED – Continued

B(2). Harassment, 42.07

B(2)(a). Solicitation Provision of 42.07(a)(1)

Is the solicitation provision of the obscenity provision of the Texas Harassment statute, Penal Code § 42.07(b)(3) and § 42.07(a)(1), unconstitutional? Does it fail strict scrutiny review? Is it overbroad or vague, either on its face or as applied to Noble?

Should the *Bruen* standard of review be applied to review of the constitutionality of the obscenity provision, § 42.07(a)(1), where the restrictions on obscene comments in place around the time the U.S. Constitution and Bill of Rights were adopted in 1791 are analyzed ("historical analogues")?

B(2)(b). Electronic Communications Provision, 42.07(a)(7)

Does the electronic communications provision of the Texas Harassment Statute, Penal Code § 42.07(a)(7), implicate the First Amendment on its face or as applied to Noble?

Is the electronic communications provision, Penal Code § 42.07(a)(7), unconstitutionally overbroad or vague, either on its face or as applied to Noble?

If § 42.07(a)(7) implicates the First Amendment, either on its face or as applied to Noble, are *Long* and *Griswold* the controlling Texas cases that should be applied?

QUESTIONS PRESENTED – Continued

If § 42.07(a)(7) does not implicate the First Amendment on its face, is it unconstitutionally vague or overbroad in any case where the First Amendment is implicated on an as applied basis?

B(2)(c). Intent Provision, 42.07(a)

Is the intent provision of the Texas Harassment statute, Penal Code § 42.07(a), unconstitutionally overbroad or vague, either on its face and as applied to Noble?

C. Speedy Trial

C(1). Prejudicial Delay

At what point are delays sufficient to justify dismissal for denial of the Sixth Amendment right to a speedy trial in an analysis under *Barker v. Wingo*, 407 U.S. 514, 1972 based on prejudice common in many cases such as pre-trial incarceration, anxiety and concern, damage to employment and social opportunities, and financial hardship?

Should Covid-19 delays be weighed against the Government in a *Barker* Inquiry for a violation of the Sixth Amendment right to a speedy trial?

QUESTIONS PRESENTED – Continued

C(2). Provisions of TCCP Article 46B Unconstitutional (Incompetency to Stand Trial)

Is TCCP Article 46B.086(e) (forced medication solely for competency to stand trial restoration purposes) unconstitutional in violation of a constitutionally protected liberty interest under the Fourteenth Amendment? Are the standards in 46B.086(e) lower than those in *Sell v. United States*, 539 U.S. 166, 2003? Is *Sell* controlling?

Is TCCP Article 46B.011 (no interlocutory appeals in competency to stand trial proceedings) unconstitutional in violation Fourteenth Amendment due process rights?

C(3). Noble Denied Right to Speedy Trial

Was Noble denied his Sixth Amendment right to a speedy trial? Did the trial court commit error by not holding a full *Barker* Inquiry for the 2½ year delay? Are competency delays included in a *Barker* Inquiry and evaluated for reasonableness? Are delays caused by judges included in a *Barker* Inquiry and evaluated for reasonableness?

QUESTIONS PRESENTED – Continued

D. Ankle Monitor As A Condition of Bail

D(1). Fundamental Constitutional Rights

Is the Eighth Amendment prohibition of "excessive bail" a fundamental federal constitutional right that should be made applicable to proceedings in state courts through the Fourteenth Amendment?

Is the Eighth Amendment prohibition of "cruel and unusual punishments" a fundamental federal constitutional right that should be made applicable to proceedings in state courts through Fourteenth Amendment?

D(2). Ankle Monitors are Excessive, Unreasonable, and Oppressive

Is requiring Noble to wear an ankle monitor an excessive, unreasonable, or oppressive condition of bail? Is requiring Noble to wear an ankle monitor cruel and unusual punishment as applied to Noble?

Should people wearing ankle monitors on supervised release be given day-for-day incarceration credit?

RELATED PROCEEDINGS

Neil Noble v. State of Texas, No. PD-0021-23, Court of Criminal Appeals of Texas. Petition for Discretionary Review denied on February 22, 2023.

Neil Paul Noble v. The State of Texas, No. 05-21-00326-CR, Fifth Court of Appeals of Texas at Dallas. Stalking conviction affirmed December 1, 2022. Motion for Rehearing En Banc denied December 30. 2022. Motion for Rehearing Denied January 4, 2023. Motion to Remove Ankle Monitor as a Condition of Bail denied on December 1, 2022. Motion for Rehearing Denied on January 4, 2023.

The State of Texas v. Neil Paul Noble, No. F1845998, Dallas County Criminal District Court No. 4. Convicted of Stalking under Texas Penal Code 42.072 by a jury on May 3, 2021. Judgment Entered on May 4, 2021.

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INTRODUCTION

A. Fundamental Constitutional Rights

Noble wants four federal constitutional rights formally declared applicable to the States through the Fourteenth Amendment: 1) Sixth Amendment right to be informed of the nature and cause the accusation, 2) Fifth Amendment right to a grand jury indictment for felony cases, 3) Eighth Amendment prohibition of excessive bail, and 4) Eighth Amendment prohibition of cruel and unusual punishments. The Eighth Amendment Prohibitions were "assumed" to apply to the States. *McDonald v. City of Chicago*, 561 U.S. 742, 762-766, Footnotes #12 & #13, 2010.

Eighth Amendment Excessive Fines Clause unanimously made applicable to the States. Majority opinion cited Due Process Clause. Justices Gorsuch and Thomas cited the Privileges or Immunities Clause. Only question presented. *Timbs v. Indiana*, 139 S. Ct. 682, 2019.

Noble wants the Sixth Amendment right to notice made constitutional error and structural error, including material variances between indictment and trial. *Chapman v. California*, 368 U.S. 18, 1967; *Arizona v. Fulminante*, 499 U.S. 279, 1991.

B. Constitutionality of Texas Harassment and Stalking Statutes

The constitutionality of the Texas Harassment Statute, 42.07, affects the constitutionality of Texas

stalking statute, 42.072, since an offense under 42.07 was incorporated as an element of 42.072(a)(1) in 2013.

Noble's appeal is post-conviction. The constitutionality of the electronic communications harassment provision, 42.07(a)(7), was appealed to this Court in 2022 in pre-trial habeas cases (certiorari denied). *Barton and Sanders v. Texas*, No. 22-430, 2023 and *Moore v. Texas*, No. 22-434, 2023.

This Court is reviewing the Colorado stalking statute in *Counterman v. Colorado*, No. 22-138. If this Court determines that the Colorado stalking statute implicates the First Amendment, either expressly or implicitly, the Court of Criminal Appeals of Texas "TCCA" will effectively be overruled. The controlling Texas case would then be *Long v. State*, 931 S.W.2d 285, Tex.Cr.App., 1996 (annoy and alarm unconstitutionally vague).

This Court could vacate and remand to the Fifth Court of Appeals of Texas where the controlling case would be *Griswold v. State*, 637 S.W.3d 888, App.5, 2021 (42.07(a)(7) unconstitutionally vague and overbroad). See *Burns v. Arizona*, 21-847, 2023 (Petition granted. Judgment vacated. Remanded in light of *Cruz v. Arizona*, 598 U.S. ___, 2023).

Presiding Judge Keller of the TCCA proposed declaring the low intensity terms/emotional states "annoy", "alarm", embarrass" and "offend" unconstitutional (dissenting opinion in *Scott v. State*, 322 S.W.3d 669, 671-677, Tex.Cr.App., 2010). Declaring those four terms unconstitutional would partially invalidate

harassment statutes in 27 states. Bother and disturb are similar terms. Limiting harassment to intent to cause substantial emotional distress is option. See long version of PDR filed January 17, 2023, Tab 6,p.334-337.

Federal case law is trending towards narrowing the construction on restrictions on speech to "true threats". *United States v. Yung*, 37 F.4th 70 (3d Cir. 2022). Several states have narrowed construction to "fighting words", "true threats" or "clear and present danger". List in 1/17/23 PDR, p.86-88.

Justice Alito wrote "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." in *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001). California does not have a harassment statute but does have a provision for a protective order with criminal penalties, Code of Civil Procedure 527.6.

The *Counterman* briefs did not mention *Screws v. United States*, 325 U.S. 91, 101-102, 1945 (specific intent requirement may avoid vagueness consequences due to lack of warning). *Screws* was cited in *City of Fargo v. Roehrich*, 2021 ND 145 and *United States v. Lampley*, 573 F.2d 783, 787, 1978. An Illinois statute similar to Colorado's was found unconstitutional in *People v. Relerford*, 104 N.E.2d 341, Ill. 2017 (lacked intent element).

C. *Dobbs*

This court overturned *Roe v. Wade*, 410 U.S. 113, 1973 in *Dobbs v. Jackson's Women's Health*, No. 19-1392, 2022. Gilbert Roe was an attorney in *Masses Publishing v. Patten*, 246 F. 24 (2d Cir. 1917) which overturned Judge Learned Hand on the Espionage Act of 1917.

OPINIONS AND ORDERS BELOW

The order of Court of Criminal Appeals of Texas denying the Petition for Discretionary Review "PDR" is not reported. App.G.49a. The opinion of the Fifth Court of Appeals of Texas at Dallas is unpublished, Case No. 05-21-00326-CR. App.A.1a-42a. The trial court's oral denial of Pre-Trial Motions is in the Reporter's Record, Vol6, p.5-10, April 26, 2021. App.K.75a-80a.

JURISDICTION

The Court of Criminal Appeals of Texas denied Noble's timely PDR on February 22, 2023. App.G.49a. The Fifth Court of Appeals of Texas at Dallas affirmed the conviction, App.A.1a-42a, and reformed the judgment, App.B.43a, on December 1, 2022.

This Court has jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. United States Constitution

First Amendment

Fifth Amendment

Sixth Amendment

Eighth Amendment

Fourteenth Amendment

II. Texas Constitution:

Article 1, Section 10

III. Texas Penal Code

Texas Penal Code 42.072 [Stalking] states in relevant part:

> (a) A person commits an offense if the person, on more than one occasion and pursuant to the same scheme or course of conduct that is directed specifically at another person, knowingly engages in conduct that:
>
> > (1) constitutes **an offense under Section 42.07**, or that the actor knows or reasonably should know the other person will regard as threatening:
> >
> > > (A) bodily injury or death for the other person

The 2011 version Texas Penal Code 42.072 [Stalking] states in relevant part:

> (a)(1) The actor knows or reasonably believes the other person will regard as threatening:

Texas Penal Code 42.07 [Harassment] states in relevant part:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
>
> (1) initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene;
>
> > (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;
>
> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another; or
>
> (b)(3) "Obscene" means containing a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function.

IV. Texas Rules of Appellate Procedure

44.2(a)

44.2(b)

V. Federal Rules of Criminal Procedure

52(a)

VI. Texas Code of Criminal Procedure

7A.01(a)(1)

17.15(a)(2)

21.03

21.11

21.19

27.08(1)

46B.011

46B.073

46B.085

46B.086(e)

46B.091(g)

46B.101

The full text is in App.H.50a-66a. Rule 14(1)(f).

STATEMENT OF THE CASE

A. Factual Background

Noble convicted of stalking on May 3, 2021 (jury). Indictment alleged violation of 42.072 by sending repeated electronic communications [42.07(a)(7)] and making an obscene comment [42.07(a)(1)] that Noble knew or should have known Complainant would regard as threatening bodily injury between October 16, 2018 and November 5, 2018. App.I.67a-69a. 51 emails submitted at trial. (Reporter's Record "RR" Vol7,36:21-38:13).

The victim is a criminal defense lawyer. Noble needed legal assistance with a harassment charge.

Court of Appeals "COA" held a reasonable jury could have found Noble's repeated communications to be obscene and that the victim felt alarmed. COA cited "good sex", being "friends with benefits", getting a hotel room together, and asking the victim to lunch and a basketball game for her birthday [**November 3rd**] App.A.3a-11a.

COA was not clear under which statutory provision the conviction was upheld. COA said "to convict for stalking, the jury had to find the elements of harassment present as well". App.A.12a.

> 42.072(a): course of conduct
>
> 42.072(a)(1): constitutes an offense under Section 42.07, or that the actor knows or reasonably should know the other person will regard as threatening:

(A) bodily injury

Under 42.07(b)(3), a comment can be obscene either by describing or soliciting an ultimate sex.

2½ year delay between arrest and trial. Noble incarcerated for 28 months for competency proceedings. Noble sent to four competency programs, one in jail and three mental hospitals (Palestine, Wichita Falls, and Terrell). Wichita Falls was the only one to request a medication order. Noble was found competent, sent back to Dallas, found incompetent again, and sent to Terrell.

Noble arrested for probation violation on October 13, 2021. Noble not given notice of the alleged violation(s) and released on bail with an ankle monitor on December 10, 2021. Noble still on bail.

B. Pre-Trial Motions

Noble filed three pre-trial motions on March 26, 2021 which are in Clerk's Record on Appeal "CR". Excerpts are included in Appendix to show issues were preserved: 1) Motion to Quash the Indictment [Indictment Insufficient] (CR465-518) App.O.92a-108a; 2) Motion to Quash Indictment [Stalking Statute Unconstitutional] (CR442-464), App.P.109a-115a; and 3) Motion to Dismiss for Denial of Right to Speedy Trial (CR430-441), App.Q.116a-117a.

Motions denied orally on April 26, 2021. App.K.75a-80a.

B(1). Indictment Insufficient

Motion based on Sixth Amendment and Article 1, Section 10 of the Texas Constitution. App.O.92a-93a. More precise information requested in Motion to Quash App.O.93a-95a.

State argued indictment tracked language stalking statute. App.K.76a-77a. Motion denied App.O.77a.

Raised on appeal: Brief, pp.101-110 and PDR, pp.27-31.

B(2). Stalking Statute Unconstitutional

Noble challenged constitutionality under the First and Fourteenth Amendments (overbroad) and the Fifth and Fourteenth Amendments (vague), both on its face and as applied to Noble. App.P.109a-110a. Noble specifically challenged the solicitation provision of 42.07(b)(3) as vague and overbroad. App.P.111a,114a-115a.

Noble's lawyer argued statute allowed arbitrary and capricious enforcement and violates the First Amendment App.K.76a. Motion denied. App.K.77a.

Raised on appeal: Brief, p.61-70 and PDR, pp.38-46. Supplemental briefs filed after *New York State Rifle & Pistol Association v. Bruen*, No. 20-843, June 23, 2022.

B(3). Denial of Right to Speedy Trial

Motion based on the Sixth Amendment. App.Q.116a-117a. Noble objected to house arrest condition of bail as oppressive (CR433). Noble did not get a full *Barker* Inquiry, just a brief hearing without testimony or other evidence. Motion denied App.K.77a-80a. (RRVol6,p.7-10). Noble requested a *Barker* Inquiry in motion mailed on February 3, 2021 but not filed until after trial. (CR596-597) App.N.90a-91a.

Raised on appeal: Brief, p.71-80 and PDR, pp.32-34.

C. Ankle Monitor as a Condition of Bail

Motion challenging the ankle monitor condition of bail filed in trial court on July 26, 2022 based on Eighth Amendment prohibition of cruel and unusual punishments. Noble received email from lawyer dated October 12, 2022 saying Court denied motion due to appeal.

Noble appealed on October 18, 2022, challenging the condition as "excessive" under the Eighth Amendment. Trial court documents were attached. App.R.118a-120a. Appeal denied as moot. App.C.44a-45a.

Separate PDR filed which was consolidated.

REASONS FOR GRANTING THE WRIT

A. Indictment

Federal indictments provide more precise information. Many state court indictments only repeat the

language of the statute, including short form indictments. Texas judges are reluctant to grant Motions to Quash seeking more precise information. Texas does not have a provision for a Bill of Particulars analogous to FRCP 7(f).

Sixth Amendment provides right **to be informed** of the nature and cause of the accusation whereas Article 1, Section 10 of the Texas Constitution provides right **to demand** the nature of and cause of the accusation. Burden of disclosure is higher under the Federal Constitution.

Double Jeopardy does not apply if conviction reversed for insufficient indictment. *United States v. Ball*, 163 U.S. 662, 1896 (jury verdict returned Sunday November 3, 1889).

A(1). Fundamental Constitutional Rights

Sixth Amendment right to notice is a fundamental right. *Powell v. Alabama*, 287 U.S. 45, 68, 1932; *In Re Oliver*, 333 U.S. 257, 273, 1948; *Cole v. Arkansas*, 333 U.S. 196, 201, 1948; *Argersinger v. Hamlin*, 407 U.S. 25, 27-28, 1972; and *Faretta v. California*, 422 U.S. 806, 818-820, 1975.

The constitutional right to bear arms is not "a second-class right". *Bruen*, 20-843 at 62.

Common law indictments were complex, technical, intricate, and cumbersome.[1]

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[1] Robert I. Broussard, The Short Form Indictment: History, Development, and Constitutionality, 6 La. L. Rev. ___ (1944).

This Court should formally declare Sixth Amendment right to notice is applicable to the States through the Fourteenth Amendment.

A(2). Constitutional Error

Insufficient notice should be constitutional error that must be harmless beyond a reasonable doubt. TRAP 44.2(a). Insufficient notice is currently reviewed for prejudice to the substantial rights of the defendant. FRCP 52(a) and TCCP 21.19 or TRAP 44.2(b). (*Russell v. United States*, 369 U.S. 742, 762, 1962 (52(a))); *Adams v. State*, 707 S.W.2d 900, 903, Tex.Cr.App., 1986 (21.19).

The application of a State harmless error rule is a Federal Question if it involves a Federal Constitutional right. *Chapman*, 386 U.S. at 20-24.

A(3). Structural Error

Indictment provides foundation from which case proceeds. "Some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless". *Id.* at 23.

Structural error effects framework within which trial proceeds rather than simply error which affects the trial itself. *Fulminante*, 499 U.S. at 310.

This court should formally declare insufficient notice structural error.

Indictment faulty. Error structural. *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007) (Scalia, dissenting).

A(4). Obscenity, Harassment, and Stalking Cases

In order to prepare a defense, an accused should be given notice of which precise comments or acts are alleged to constitute a violation or be part of the course of conduct. Such statutes contain undefined terms.

Where definition of offense includes generic terms, indictment must be more specific. *Russell*, 369 U.S. at 765. Undefined term of indeterminate or variable meaning requires more specific pleading. *Ross*, 573 S.W.3d at 820.

There are cases where more particularity is required, including sending threatening letters. The letters are required to be set forth like perjury and forgery. (*United States v. Gooding*, 25 U.S. 460, 474-475, 1827). Numerous exceptions exist to the rule that following the words of a statute is sufficient. (*United States v. Reece*, 92 U.S. 214, 233, 1875).

There should be an averment setting out where the picture or language was obscene. *Hudnall v. State*, 3 S.W.2d 86, Tex.Cr.App., 1928; *State v. Hanson*, 23 Tex. 232, 1859

Animal cruelty information insufficient. Didn't allege specific acts done. *Haecker v. State*, 571 S.W.2d 920, Tex.Cr.App., 1978.

Murder is a word of common meaning. Short form sufficient. Judge John Rutherford Land. *State v. White*, 136 So. 47, La. 1931

Stalking cases with more precise notice:

1) Indictment alleges: 1) November 23, 1999, knocked on Charles' bedroom window; 2) June 25, 2000, left telephone message "You're gonna be done, bitch"; 3) July 4, 2000, left a telephone message "You fucked up my life, now you have got to be part of it until I die", 4) July 4, 2000, left a phone message saying he would "make things even with Charles"; 5) July 6, 2000, followed Charles in car. *Lewis v. State*, 88 S.W.3d 383, 389, App.2, 2002.

2) Information charged three acts constituting the conduct of stalking: (1) seizing complainant's head or neck with arm, September 30, 1993; (2) seizing complainant's arm with hand, February 15, 1994; and (3) parking car outside complainant's residence, March 29, 1994. *Long,* 931 S.W.2d at Footnote #2.

Hess, 124 U.S. at 488 is cited in *Blake v. State*, 180 S.W.2d 351, 352-353, Tex.Cr.App., 1944.

A(5). Statement of Facts

A(5)(a). Required Under Federal Law

The same passage from *Hess*[2] requiring a statement of facts is cited in both *Russell*, 349 U.S. at 765 and *Hamling*[3] ("Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged."). *Hess* cited in *United States v. Slepicoff*, 524 F.2d 1244, 1248 (5th Cir. 1975). FRCP 7(c) based on *Hess*.

Hamling is still the controlling case. *United States v. Sittenfeld*, 522 F. Supp. 353, 363-364, S.D. Ohio, 2021 ("little has changed since *Hamling*"). *United States v. Landham*, 251 F.3d 1072, 1079 (6th Cir. 2001) ("must be accompanied by a statement of facts and circumstances", citing *Hamling*).

Older Federal cases requiring statement of facts: *United States v. Carll*, 105 U.S. 611, 612-613, 1882; *United States v. Simmons*, 96 U.S. 360, 362-363, 1877; *United States v. Cruikshank*, 92 U.S. 542, 557-559, 1876; *United States v. Cook*, 84 U.S. 168, 174, 1872.

More Precise Notice Required in Felony Cases. *U.S. v. Mills*, 32 U.S. 138, 1833.

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[2] *United States v. Hess*, 124 U.S. 483, 487, 1888.

[3] *Hamling v. United States*, 418 U.S. 87, 117-118, 1974.

A(5)(b). Conflict under Texas Law

By statute and decisional law, "Everything should be stated in an indictment which is necessary to be proved". Another rule of equal validity is "Ordinarily, an indictment drawn in the language of the statute is sufficient" (citations omitted) (*Reynolds v. State*, 547 S.W.2d 590, 592, Tex.Cr.App., November 3, 1976).

The issue is not whether the information is defective on its face, but whether it can withstand attack by a motion to quash for failure to give adequate notice to prepare a defense. When defendant petitions for sufficient notice by motion to quash setting out the manner in which notice is deficient, he must be given such notice. *Drumm v. State*, 560 S.W.2d 944, 946-947, Tex.Cr.App., November 2, 1977).

Indictment must state facts that, if proved, show an actual violation of the law. (*Hughitt v. State*, 583 S.W.3d 623, 626, Tex.Cr.App., 2019).

Indictment must allege facts necessary: 1) to show offense was committed (27.08(1)); 2) to bar subsequent prosecution; 3) to give defendant notice. Intent of the Texas Constitution is that accused be given information to prepare defense. *Baker v. State*, 58 S.W.2d 534, Tex.Cr.App., 1933. There is nothing to inform accused of the specific acts he is alleged to have committed to commit this offense. Reversed. *Terry v. State*, 471 S.W.2d 848, 851-852, Tex.Cr.App., 1971.

The Texas Code of Criminal Procedure was substantially revised in 1965. The Legislative intent was

to improve judicial efficiency and to bring the code into line with recent United States Supreme Court rulings. (Appendix to Appellant's Brief,Tab 6,p.163-169).

A(6). Court Determines Whether Indictment Sufficient to Support Conviction

TCCP 27.08(1) allows indictment to be quashed it if does not appear that an offense against the law was committed. Including a statement of facts will enable the Court to make that determination, similar to a demurrer.

Corollary purpose of indictment is to inform Court of facts alleged so Court may decide whether they are sufficient to support a conviction. *Russell*, 369 U.S. at 768. Courts should be able to determine whether facts stated are sufficient to support a conviction. (*Blake*, 180 S.W.2d at 352-353). Indictment alleged no more than misdemeanor offense. *Diruzzo v. State*, No. PD-0745-18, Tex.Cr.App., 2019.

A(7). Indictment in This Case Insufficient

A(7)(a). Notice of Reliance on Solicitation Provision

Noble requested notice of which provision of 42.07(b)(3) the prosecution planned to rely on: a description of an ultimate sex act OR a solicitation to commit an ultimate sex act (CR466,Item #2), App.O.93a-94a. Such notice is required under Texas law since there is more than one manner or means of

violating the statute. *State v. Ross*, 573 S.W.3d 817, 820, Tex.Cr.App., 2019.

Noble's defense was prejudiced. Noble's lawyer was not prepared. There was no argument on the solicitation provision. State relied on the solicitation provision in their Appellate Brief,p.37,53.

Indictment and prosecution focused on first branch of section 371. Neither appellant or prosecution contemplated culpability under the second branch of 371. Judge found appellant guilty under second branch. Variance not harmless. Conviction reversed. *United States v. Haga*, 821 F.2d 1036, 1045-1046 (5th Cir. 1997)

"To uphold a conviction on a charge that was neither alleged in the indictment nor presented to a jury at trial offends the most basic notions of due process". *Dunn v. United States*, 442 U.S. 100, 106, 1979.

A(7)(b). Notice of Precise Comments

Noble requested notice of the precise comments alleged to be obscene or threating (CR466,Items.8,9),App.O.94a-95a.

Written instrument should be set out in indictment when it forms the basis of the offense or its construction is material to the determination of guilt. *Terry*, 471 S.W.2d at 849-850, footnote #1, citing *Rudy v. State*, 195 S.W. 187, Tex.Cr.App., 1917 (sending anonymous letter).

Noble's defense was prejudiced. Noble's lawyer was not prepared to argue the comments were not obscene.

TCCA twice reversed convictions because comments did not meet definition of obscene. *Lefevers v. State*, 20 S.W.3d 707, Tex.Cr.App., 2000 ("I want to feel your breasts"); *Pettijohn v. State*, 782 S.W.2d 866, Tex.Cr.App., 1989 ("making sexual advances to little boys"; "molesting little children").

"I want you" not "true threat" *Shackelford v. Shirley*, 948 F.2d 935 (5th Cir. 1991).

A(7)(c). Statement of Facts and Circumstances

Noble requested a Statement of Facts including all acts alleged to be part of the course of conduct and any facts and circumstances relied on to establish intent (CR466,Items.10,11),App.O.95a. Noble requested notice of all times Noble was asked to stop contacting the victim (CR467,Item.12),App.O.95a.

Under TCCP 21.03, Everything should be stated in an indictment which is necessary to be proved.

State may rely upon circumstances surrounding defendant's actions to prove intent. Six voicemails. (*Wilson v. State*, 448 S.W.3d 418, 424, Tex.Cr.App., 2014).

Lawyer not prepared. Defense prejudiced.

A(8). Variance Between Indictment and Trial

A(8)(a). Grand Jury Indictment Fundamental Constitutional Right in Felony Cases

The Court should overrule *Hurtado v. California*, 110 U.S. 516, 1884 (The Fourteenth Amendment does not require a grand jury indictment in a State murder prosecution). See *Stirone v. United* States, 361 U.S. 212, 215, 1960) (grand jury indictment required in felony cases. Variance not insignificant. Conviction reversed.).

A(8)(b). Constitutional Error

A variance is a difference between allegations in indictment and proof at trial. "Notice is the essential reason for requiring correspondence between allegation and proof". *Bennett v. United States*, 227 U.S. 333, 338, 1913.

A variance should be categorized as constitutional error. TRAP 44.2(a). "A defendant could not then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him". *Russell*, 369 U.S. at 770.

A variance is currently reviewed for substantial prejudice to defendant. *Kotteakos v. United States*, 328 U.S. 750, 1946; *United States v. Lander*, 668 F.3d 1289, 1295 (11th Cir. 2012) (Was the defendant surprised and unable to prepare defense? Conviction reversed.).

A(8)(c). Fatal Variance in This Case

Indictment only mentioned emails. App.I.67a-69a. At trial, the State presented a birthday card and testimony about a visits to the victim's office and home. (RR,Vol7,p.32-34,p.42-46,p.47-55 and Vol8,p.13-25)

Noble's defense was prejudiced. Noble's lawyer was not prepared to provide a defense against the birthday card and the visits.

A(8)(d). Evidence Inadmissible

Evidence pertaining to events not plead in the indictment should not be admissible at trial. Errors should be reviewed for substantial prejudice under TRAP 44.2(b). The jury was influenced by this evidence which substantially prejudiced Noble's defense.

"Indictments are the basis for the admission of evidence". *Cousins v. State*, 224 S.W.2d 260, 261, Tex.Cr.App., 1949. Three questions arise: (3) whether the evidence was admissible under the indictment. Judge Learned Hand. *United States v. Dennis*, 183 F.2d 201, 207 (2d Cir. 1950).

B. Texas Stalking Statute Unconstitutional

The constitutionality of harassment and stalking statutes are repeatedly challenged in state courts. There is an enormous volume of conflicting and confusing case law that needs to be settled.

COA found the evidence sufficient to uphold the conviction, but it was not clear under which statutory provision.

Conviction, which so far as record discloses, may have rested on invalid clause, must be set aside. (*Stromberg v. California*, 283 U.S. 359, 369-370, 1931).

B(1). Solicitation Provision, 42.07(b)(3)

Obscenity provision of harassment statute, 42.07(a)(1), relies on definition of obscene in 42.07(b)(3) which prohibits "a patently offensive description of or a solicitation to commit an ultimate sex act". Solicitation provision has not been construed by Texas courts. 42.07(a)(1) regulates content and implicates First Amendment. *Ex Parte Nuncio*, No. PD-0478-19, 10, Tex.Cr.App., 2022).

B(1)(a). Fails Strict Scrutiny

Solicitation provision fails strict scrutiny. It is not narrowly tailored to achieve a legitimate government objective. Under the State's construction, merely asking a person to have sex is obscene. Asking someone out to dinner or to come over to watch TV is obscene since such invitations could lead to sex. The State provided no justification for the solicitation provision.

"To survive strict scrutiny, a State must do more than assert a compelling state interest, it must demonstrate that its law is necessary to serve the asserted interest". *Burson v. Freeman*, 504 U.S. 191, 199, 1992.

Strict scrutiny review is "fairly included" in overbroad challenge. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 1992.

B(1)(b). Overbroad

Solicitation provision is overbroad. Prohibiting asking a person out on a date or to have sex outlaws a substantial amount of constitutionally protected speech. The "liberty" protected by the Due Process Clause includes "the right to engage in private, consensual sexual acts" *Dobbs*, at 32 citing *Lawrence v. Texas*, 539 U.S. 558, 2003. "Some segments of population could find any form of barroom entertainment vulgar" (*Courtmanche v. State*, 507 S.W.2d 545, 546, Tex.Cr.App., 1974).

Miller does not prohibit "solicitation" [asking a person to have sex], just patently offensive representations or descriptions of sex. Prosecution limited to patently offensive "hard core" sexual conduct. *Miller v. California*, 413 U.S. 15, 25, 27, 1973. Statute "aimed at obnoxiously debasing portrayals of sex". *Hamling*, 418 U.S. at 112.

B(1)(c). Vague

Solicitation provision is unconstitutionally vague. A person of ordinary intelligence would not know what is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 108-190, 1972.

Does the solicitation to commit an ultimate sex act have to contain a patently offensive description of an

ultimate sex act? Does it require an offer of payment for sex or a request to perform a criminal act such as sex with minor? Can making a flirtatious comment or a sexual innuendo be a violation?

"Separation of legitimate from illegitimate speech calls for more sensitive tools". *Gooding v. Wilson*, 405 U.S. 518, 528, 1972. "It is clear his illicit suggestions are covered by the Statute. Most people would be offended by an invitation to engage in prostitution". *State v. Koetting*, 616 S.W.2d 822, 826, Mo. 1981.

State relied on definition #1 of solicitation in *Black's Law Dictionary* (Brief,p.53): 1) a "request". Noble cited on Definitions #3 and #2 from *Black's*: 3) An offer to pay for sex or 2) urging another to commit a crime. Reply Brief,p 61-62.

Solicitations made unlawful are acts looking toward commission of another crime (child pornography) (*United States v. Williams*, 553 U.S. 285, 300, 2008. Solicitation of prostitution – offered to perform sexual acts in exchange for money.). (*Arcara v. Cloud Books*, 478 U.S. 697, 699, 1986).

B(1)(d). Historical Analogues

Obscenity not widely outlawed in United States in 1791. It was a crime in Pennsylvania. *Commonwealth v. Lewis*, 30 Pa. D. & C.2d 133, 140, 1962. "This Court has always assumed that obscenity is not protected by the freedoms of speech and press". The oldest case cited was *Ex Parte Jackson*, 96 U.S. 727, 1878 (Act of

July 12, 1876). *Roth v. United States*, 354 U.S. 476, 481, 1951.

Colorado is only other state with similar solicitation provision 18-9-111(1.5).

B(2). Electronic Communications Provision, 42.07(a)(7).

42.07(a)(7) prohibits electronic communications sent in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

Five of the seven terms/emotional states have been declared unconstitutional in cases in other jurisdictions, including by this Court (annoy, alarm, offend, embarrass, and harass)

B(2)(a). First Amendment Implicated

The TCCA bizarrely ruled that 42.07(a)(7) does not implicate the First Amendment in *Barton*[4] and *Sanders*,[5] citing *Scott*, supra, which ruled that the telecommunication harassment provision, 42.07(a)(4), did not implicate speech.

Arizona is the only other state to rule a harassment statute does not implicate the First Amendment. *State v. Coates*, No. 2 CA-CR 2014-0175, App.2, 2015 (aggravated harassment). A list of cases in other states where the First Amendment is implicated is 1/17/23

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[4] *Ex Parte Barton*, No. PD-1123-19, Tex.Cr.App., 2022.

[5] *Ex Parte Sanders*, No. PD-0469-19, Tex.Cr.App., 2022.

PDR, Tab 7,p.338-342. The First Amendment was not implicated in a specific case, "as applied". *United States v. Waggy*, 936 F.3d 1014 (9th Cir. 2019) (Washington telephone harassment statute).

Noble reviewed over 200 harassment and stalking cases from Texas, including protective orders. 75% substantially implicate speech. Texas courts often cite comments made by the defendant in upholding the sufficiency of the evidence[6]. [1/17/23 PDR, Tab 5,p.332 and Tab 13,p.360-393].

	Cases	Speech
42.07(a)(4)	40	78%
42.07(a)(7)	10	100%
42.072	78	72%
Protective Order	24	75%
Total	152	76%

Noble reviewed 30 Federal stalking cases under 18 U.S.C. 2261A. 85% implicated speech. Over half the cases were under 2261A(2)(B) (intends to use interstate communication to cause substantial emotional distress). 93% implicated speech. 2261A(2)(B) would be unconstitutional if restrictions on speech require intent to threaten bodily injury. 2261A(2)(A) applies to bodily injury. Same for Colorado 18-3-602(a)-(c).

Lacy Hensley, a domestic-violence expert, testified 78% of 1,400 domestic violence victims studied

[6] 59 didn't have a statement of facts.

reported electronic stalking. *Fernandez v. State*, No. 02-18-00483-CR, App.2, 2020.

Even if 42.07(a)(4) does not implicate speech, it was unreasonable for *Barton* to extend the legal reasoning from *Scott* to 42.07(a)(7). Electronic communications are much broader than telephone communications. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1733, 2017 (commonplace social media websites); *Van Buren v. United States*, No. 19-783, 19, 2021 (breathtaking amount of commonplace computer activity).

There are two standards to evaluate constitutionality when a statute regulates both speech and conduct: 1) *O'Brien v. United States*, 391 U.S. 367, 377, 1968 (within constitutional power of the Government; furthers important governmental interest unrelated to the suppression of free expression; and the incidental restriction on First Amendment freedoms is no greater than is essential), and 2) *Broadrick v. Oklahoma*, 413 U.S. 601, 615-616, 1973 ("where conduct and not merely speech is involved, we believe that the overbreadth of the statute must be not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep").

Statute directed primarily at conduct, not speech. *Broadrick*'s substantial overbreadth test for conduct related statutes applies. This assessment is not subject to serious debate. *Staley v. Jones*, 239 F.3d 769, 786 (6th Cir. 2001).

District Court applied *O'Brien*. Court of Appeals ruled the effect on speech was more than incidental

and applied a traditional First Amendment analysis. *Green v. Miss America*, 52 F.4th 773 (9th Cir. 2022).

"That there was restriction upon Thomas' right to speak, there can be no doubt". *Thomas v. Collins*, 323 U.S. 516, 534, 1945. "Speech on matters of public concern is at the heart of First Amendment protection". *Snyder v. Phelps*, 562 U.S. 443, 451-452, 2011. Student's social media posts protected under the First Amendment. *Mahanoy v. Levy,* 141 S. Ct. 2038, 2042-44, 2021.

B(2)(b). Terms/Emotional States Unconstitutional

B(2)(b)(1). United States Supreme Court

Annoy and offend found unconstitutionally overbroad: *Terminiello v. Chicago*, 337 U.S. 1, 4, 1949 (annoyance). *Cohen v. California*, 403 U.S. 15, 18, 1971 (offensive); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245, 2002 (offensive).

Annoy was found unconstitutional both under the due process standard of vagueness without the First Amendment being implicated and under the First Amendment right of assembly and association. *Coates v. Cincinnati*, 402 U.S. 611, 614, 1971.

B(2)(b)(2). Top Courts in Other States

Similar statutes have been found unconstitutional by the top court in five other states:

People v. Norman, 703 P.2d 1261, 1266-1267, Colo. 1985; (with intent to "harass, annoy, or alarm" engages in conduct "that alarms or seriously annoys" and "serves no legitimate purpose" – vague);

State v. Ray, 733 P.2d 28, Or., 1987 (with "intent to harass, annoy or alarm" another subjects another "to alarm or annoyance" – vague and overbroad);

People v. Smith, 862 P.2d 939, Colo. En Banc 1993 (with intent to harass, alarm, annoy makes repeated communications in "offensively coarse" language [in public places] – overbroad);

State v. Brobst, 857 A.2d 1253, N.H., 2004 (intent to annoy or alarm – overbroad);

State v. Vaughn, 366 S.W.3d 510, Mo. 2012 ("knowingly makes repeated unwanted communications to another" – overbroad);

People v. Golb, 15 N.E.3d 805, Court of Appeals of New York, 2014 (Intent to harass, annoy, threaten, or alarm – vague and overbroad);

People v. Moreno, 506 P.3d 849, Colo. 2022 (in a manner "intended to harass" – cyberbullying, overbroad).

B(2)(b)(3) Annoy and Alarm Unconstitutional in Other States

Annoy and alarm have been found unconstitutional in other states: overbroad (seven) and vague (three).

"Messages likely to cause 'annoyance' or 'alarm' are almost limitless; we will not burden this opinion with hypothetical examples". *State v. Blair*, 601 P.2d 766, 767, Or. 1979)

Overbroad

Colorado: *Bolles v. People*, 541 P.2d 80, Colo. 1975

Illinois: *People v. Klick*, 66 Ill.2d 269, Ill. 1977 (annoy)

New Hampshire: *Brobst*, supra

Oregon: *Ray*, supra

Utah: *Provo v. City of Whatcatt*, 1 P.3d 1113, Utah App., 2000

Washington: *City of Everett v. Moore*, 683 P.2d 617, Wash. App., 1984

Wisconsin: *State v. Dronso*, 279 N.W.2d 710 (Wis. App. 1979) (annoy)

Vague

Colorado: *Norman*, 703 P.2d at 1266-1267

Oregon: *Ray*, supra

Washington: *Everett*, supra

Source: Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, 107 Nw. U. L. Rev. 731 (2013), Footnote #44.

B(2)(b)(4). Embarrass

Embarrass has been found overbroad. *Rynerson v. Ferguson*, 355 F.Supp. 964, 972, W.D. Washington, 2019; *People v. Marquan*, 19 N.E.3d 480, 487-488, Court of Appeals of New York, 2004.

B(2)(c). 42.07(a)(7) is Overbroad

B(2)(c)(1). Construction Narrowed to True Threats or Fighting Words

Federal case law has been narrowing construction to "true threats". Several state courts have narrowed construction to "fighting words".

Federal Case Law

"Intent to harass or intimidate" was narrowed to "true threats" to save constitutionality. A broad construction could include nonviolent or nonthreatening speech. *Yung*, supra.

Other federal courts narrowing construction to "true threats" are: *United States v. Sryniawski*, 48 F.4th 583 (8th Cir. 2022); *United v. Weiss*, 475 F. Supp. 3d 101, N.D. Cal. 2020; *United States v. Fleury*, 20 F.4th 1353 (11th Cir. 2021); *Shackelford v. Shirley*, 948 F.2d 935 (5th Cir. 1991).

State Case Law

Noble found seventeen States that have limited application of harassment and/or stalking statutes

to: fighting words (eight), true threats (three), both fighting words and true threats (four), or clear and present danger (two). List in 1/17/23 PDR, p.86-88.

Five examples of "fighting words":

Brooks v. Birmingham, 485 So.2d 385, 387, Al.Cr.App. 1985

People v. Hansen, 548 P.2d 1278, 1281, Colo. 1976

State v. Fratzke, 446 N.W.2d 781, 784, Iowa, 1989

Commonwealth v. Welch, 825 N.E.2d 1005, Mass., 2005

Mercer v. Winston, 199 S.E.2d 724, Va., 1973

B(2)(c)(2). Sole Intent to Harass

The Federal harassment statute prohibits communications "solely to harass." 47 U.S.C. 223(1)(e).

"In the usual case under 42.07(a)(7), the violator will have only the intent to inflict emotional distress for its own sake, not an intent to engage in legitimate communication." *Scott*, 322 S.W.3d at 670.

25 states have exception for communications with legitimate purpose.

B(2)(d). 42.07(a)(7) is Vague

The Due Process principles of the "void for vagueness" doctrine are: 1) laws must give the person of

ordinary intelligence a reasonable opportunity to know what is prohibited, 2) laws must provide explicit standards for law enforcement to prevent arbitrary and discriminatory enforcement, and 3) when the First Amendment is implicated, more specificity is required so as not to inhibit exercise of the First Amendment freedoms. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 1972.

B(2)(d)(1). First Amendment Implicated

If 42.07(a)(7) implicates the First Amendment, it would be unconstitutionally vague under prior Texas case law under the arbitrary and discriminatory enforcement prong of a vagueness challenge. See *Long*, 931 S.W.2d at 287-288 citing *Grayned,* 408 U.S. at 108-109; *May v. State*, S.W.2d 438, 440, Tex.Cr.App., 1989 (By failing to provide reasonably clear guidelines, 42.07 gives officials unbounded discretion); *State v. Edmonds*, 933 S.W.2d 120, 126, Tex.Cr.App., 1996 (police officers, prosecutors, and triers of fact are given unfettered discretion); *Kramer v. Price,* 712 F.2d 174, 178, (5th Cir. 1983) (pre-1983 Texas harassment statute, annoy and alarm unconstitutionally vague).

This Court recognized the more important aspect of the vagueness doctrine is the requirement that Legislatures establish guidelines to govern law enforcement. Without such guidelines, a criminal statute is susceptible to arbitrary enforcement and may permit policemen, prosecutors, and juries to pursue

their personal predilections. (*Kolendar v. Lawson*, 461 U.S. 352, 358, 1983).

Colorado and Oregon courts have found harassment statutes give too much discretion to law enforcement, judges and juries. *People v. Gomez*, 843 P.2d 1321, Colo. 1993; *Norman*, supra. *Bolles*, supra; *Ray*, supra; *Blair*, supra.

California's threat statute provided to much unguided discretion. *People v. Mirmirani*, 178 Cal.Rptr. 792, 797-799, Cal. 1981.

B(2)(d)(2). Unconstitutionally Vague In All Applications

If the First Amendment is not implicated, a statute must be vague in all its applications. *Hoffman v. Flipside*, 455 U.S. 489, 1982.

Coates is the controlling case. Annoy is unconstitutionally vague even if the First Amendment is not implicated (may depend on whether policeman is annoyed).

A statute is vague in all its applications if it gives law enforcement and the Courts too much discretion to apply it in an arbitrary, discriminatory, or selective manner. *Chicago v. Morales*, 527 U.S. 41, 70-73, 1999, (Justice Breyer, concurring. Plurality opinion, concurring opinion carries weight of opinion of full court). *Smith v. Goguen*, 415 U.S. 566, 1974 (flag misuse), *Papachristou v. City of Jacksonville*, 405 U.S. 156, 1972 (vagrancy).

B(3). Intent Provision Unconstitutional, 42.07(a)

42.07(a) is unconstitutional based on the same legal reasoning discussed above involving the words annoy, alarm, and embarrass. They allow arbitrary, discriminatory, and selective enforcement. 42.07(a) applies to all eight sections of 42.07, rendering the entire statute unconstitutional.

Intent requirement helps with the notice prong of a vagueness challenge. *Screws*, supra. A specific intent requirement may mitigate a law's vagueness with respect to the adequacy of notice. *Vaughn*, 366 S.W.3d at 522.

An Arizona statute that presumed persons who use obscene, lewd, or profane language do so with the specific intent to harass was found unconstitutional. *Baker v. State*, 494 P.2d 68, Ariz. App., 1972. See also *State v. Dugan*, 303 P.3d 755, Mon. 2013 (use of certain language prima facie evidence of intent unconstitutional).

B(4). Stalking, 42.072

B(4)(a). 42.07 Unconstitutional

If all or part of 42.07 is unconstitutional, 42.072 will be unconstitutional since an offense under 42.07 is incorporated into 42.072(a)(1).

B(4)(b). Strict Scrutiny

Stalking statutes are content-based regulations and should be evaluated under strict scrutiny. The content is "threats". It is legitimate for the government to prohibit threats, but such legislation must be narrowly tailored. See *Reed v. Town of Gilbert*, 576 U.S. 155, 2015 (content based if law applies because of message expressed). Illinois stalking statute content-based regulation. *Relerford.*

B(4)(c). Knew or Reasonably Should Have Known Standard

Second clause of 42.072(a)(1) requires that the actor knows or reasonably should know the other person will regard his behavior as threatening bodily injury, etc. An intent or purpose to threaten is required in some jurisdictions. *People v. Ashley,* 162 N.E.3d 200, 216, Ill. 2020; *Matter of Welfare of A.J.B.*, 929 N.W.2d 840, 850, Minn. 2019; *United States v. Tobin*, 552 F.3d 29, 33-34 (1st Cir. 2009).

This clause should be narrowed to "true threats" or found overbroad. "True threats" encompass statements where speaker intends to communicate a serious threat to commit an act of unlawful violence. (*Virginia v. Black*, 538 U.S. 343, 359, 2003).

Intent to threaten should be required. See *Counterman.*

B(4)(d). 2013 Amendment

The 2013 Amendment added an offense under 42.07 as an element of 42.072(a)(1). The same behavior can be prosecuted as a Class B Misdemeanor (up to 6 months) or a Third Degree Felony (2 to 10 years). A prior harassment conviction can enhance a stalking conviction to a Second Degree Felony (2 to 20 years). "The severity of criminal sanctions may cause speakers to remain silent". *Reno v. ACLU*, 521 U.S. 844, 872, 1997.

The Legislature limited the prohibited conduct in the 1997 stalking statute (and its mens rea element) to conduct threatening bodily injury or death. Mere courtship, even persistent courtship, does not suffice. *Ploeger v. State*, 189 S.W.3d 799, 806, 814, App.1, 2006.

2013 amendment gives police, prosecutors, judges and juries too much discretion in every case and could lead to arbitrary, discriminatory, and selective enforcement. Statute held inoperable since there was conflict in penalties. *Stevenson v. State*, 167 S.W.2d 1027, Tex.Cr.App., 1943; *Moran v. State*, 122 S.W.2d 138, Tex.Cr.App., 1938. This is not the same situation as in *United States v. Batchelder*, 442 U.S. 114, 1979 (statutes operate independently of each other).

Lesser and greater offenses with minimal differences are not permissible. *Long*, 931 S.W.2d at 294. Different punishments for same conduct found unconstitutional in other states. *State v. Anderson*, 16 P.3d 214, Ariz. App., 2000. (unconstitutionally vague). *People*

v. Chase, 11 P.3d 740, 756, Colo. App., 2013 (violates equal protection)

Legislative intent was to add harassment to list of crimes for which victim protective orders are available under TCCP 7A.01(a)(1), now 7B. Stalking added in 2011. *Shoemaker v. State*, 493 S.W.3d 710, 716-717, App.1, 2016; *Webb v. Schlagal*, 530 S.W.3d 793, footnote #1, App.11, 2017.

42.07 should have been added to 7A rather than incorporated into 42.072(a)(1). Intent was reasonable, the mechanism used was not. *Estes v. State*, 546 S.W.3d 691, 697, Tex.Cr.App., 2018 ("rational basis" review citing *FCC v. Beach*, 508 U.S. 307, 313-315, 1993).

B(5). Unconstitutional As Applied to Noble

First Amendment violations can be remedied through as-applied litigation. (*Virginia v. Hicks*, 539 U.S. 113, 124, 2003).

As-applied claims are based on evidence actually submitted at trial. *Karenev v. State*, 281 S.W.3d 428, 435, Tex.Cr.App., 2009 (concurring opinion).

B(5)(a). Obscenity Provision, 42.07(a)(1) and 42.07(b)(3) Overbroad

There were no patently offensive descriptions of an ultimate sex act. Noble did not offer to pay money

for sex. The conviction discourages Noble from asking women out on dates (overbroad as applied).

Vague

Noble was not aware flirtatious comments and sexual innuendos could be prosecuted as obscene until Noble read *Nuncio* and *Lafaitt* which were dated after the indictment. *Ex Parte Nuncio*, 579 S.W.3d 448, App.4, 2019; *Lafaitt v. State*, No. 12-18-00351-CR, App.12, 2020. (vague as applied)

Applying a Supreme Court ruling that enlarges a criminal statute retroactively violates due process. *Bouie v. City of Columbia*, 378 U.S. 347, 352-355, 1964.

B(5)(b). First Amendment Implicated, 42.07(a)(7)

COA cited comments from the emails in upholding the sufficiency of the evidence. "We deal here with a conviction resting solely on speech" *Cohen*, 403 U.S. at 18.

If the First Amendment is implicated in Noble's case, *Long* and *Griswold* are the controlling cases. 42.07(a)(7) is unconstitutional as applied to Noble.

B(5)(c). Noble's Speech Constitutionally Protected

The emails contained three categories of constitutionally protected speech:

1. Sixth Amendment right to select own attorney. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908, 2017.

2. "Liberty" includes the right to engage in private, consensual sexual acts. *Dobbs*, supra.

3. Mass shootings are a matter of public concern. *Snyder*, supra.

Examples of successful overbroad as-applied challenges under Federal law are: 1) *Sryniawski* (cyberstalking, matter of public concern), and 2) *Weiss* (electronic harassment, political speech).

B(5)(d). Knew or Should Have Known Standard

State failed to prove Noble was aware Madson was in fear of bodily harm (rape). Madson conceded this at trial.

> "I said I wanted no contact with him and I wanted him to be informed to not have any contact with me. What they chose to do with it was up to them." (RRVol8,p.73:1-3).

Noble contacted Madson about a pending harassment charge. She did not have a sufficient understanding of the legal issues involved. First Amendment applies if there was intent to convey a message and likelihood message would be understood. *Texas v. Johnson*, 491 U.S. 397, 404, 1989.

> Madson testified "I don't really understand what he is talking about, so that's the only thing that's concerning is that it doesn't make a lot of sense" (RRVol8,p.31:3-5).

B(6). Historical Regulation of Speech

Important cases of this Court are: *Schenck v. United States*, 249 U.S. 47, 1919 ("clear and present danger", World War I), *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573, 1942 ("fighting words", World War II), and *Watts v. United States*, 394 U.S. 705, 708, 1969 ("true threats").

First harassment statute was New York (1965). Model Penal Code for harassment included "serves no legitimate purpose" element.[7] First stalking statute was California (1990).

C. Speedy Trial

This Court emphasizes prejudice from having charges pending and pre-trial incarceration, including stigma. Lower courts place less weight on the passage of time.

Competency delays have been getting longer due to lack of bed space in mental hospitals. The Corona-virus shutdown created a large backlog since transfers from jail to mental hospitals were stopped.

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[7] Linda M. Gunderson, Criminal Penalties for Harassment, 9 Pac. L. J. 217 (1978), 233-234.

C(1). Competency Delays Included in *Barker* Inquiry

COA said competency delays don't count against the State in a Speedy Trial analysis. App.A.20a-21a.

Competency delays are excludable under the Speedy Trial Act of 1974 [18 U.S.C. 3161(h)]. Competency delays are not excluded from a *Barker* Inquiry under the Sixth Amendment right to a speedy trial. *United States v. Patterson*, 872 F.3d 426 (7th Cir. 2017); *United States v. McGhee*, 532 F.3d 733 (8th Cir. 2008); *United States v. Vasquez*, 918 F.2d 329 (2d Cir. November 2, 1990).

C(2). Prejudice from Pending Charges and Pre-Trial Incarceration

Noble claimed prejudice from the negative effects of being incarcerated for 28 months and the anxiety, concern and stigma from criminal charges with competency proceedings. Noble did not claim prejudice for impairment of defense.

Prejudice typically associated with criminal charges includes oppressive pre-trial incarceration, anxiety and concern, stigma, damage to income earning ability, damage to family and social relations, and financial hardship. *United States v. Ewell*, 383 U.S. 116, 120, 1966; *Barker v. Wingo*, 407 U.S. 514, 520, 1972; *United States v. Doggett*, 505 U.S. 647, 654, 1992; *United States v. Marion*, 404 U.S. 307. 320, 1971; *United States v. MacDonald*, 456 U.S. 1, 7-8, 1982; *Addington v. Texas*,

441 U.S. 418, 425-426, 1979; *Vitek v. Jones*, 445 U.S. 480, 492-494, 1980.

Affirmative demonstration of prejudice not necessary. The four *Barker* factors must be considered together. (*Moore v. Arizona*, 414 U.S. 25, 26, November 5, 1973).

Delay must persist for 18 months longer than minimum to weigh heavily in favor of accused. *Amos v. Thornton*, 646 F.3d 199, 206-207 (5th Cir. 2011).

Delay of 18-30 months due to government negligence not sufficient to justify dismissal. *Leachman v. Stephens*, 581 F. App'x 390 (5th Cir. 2014) (27 months); *Goodrum v. Quarterman*, 547 F.3d 249 (5th Cir. 2008) (2 ½ years); *United States v. Dunn*, 345 F.2d 1285 (11th Cir. 2003) (18 months); *United States v. Netterville*, 533 F.2d 903 (5th Cir. 1977) (19 months); *United States v. Herman*, 576 F.2d 1139 (5th Cir. 1978) (22 months).

C(3). Covid-19 Delay

Covid-19 not a valid reason for 18-month delay. There is no Pandemic exception to the Constitution. The prejudice is obvious. Court ordered trial to start within two weeks. *Kurtenbach v. Howell*, 509 F. Supp. 1145, 1152, D. S.D., 2020.

Covid-19 delays not sufficient to justify dismissal. *United States v. Olson*, 21 F.4th 1036 (9th Cir 2022); *United States v. Smith*, 494 F. Supp. 3d 772, E.D. Cal. 2020; *United States v. Melendez*, 532 F. Supp. 3d 50, D. Mass. 2021.

C(4). Trial Court Should Have Held Full *Barker* Inquiry

Noble was entitled to a full *Barker* Inquiry hearing. The delay from arrest to trial was 2½ years (November 5, 2018 through April 26, 2021).

Judge Collins held a brief hearing before voir dire. There were no witnesses called and no evidence presented. App.K.77a-80a.

The State agreed delay sufficient to trigger full *Barker* Inquiry. Brief, p.62. App.M.87a-89a.

Delay of eight months to a year is presumptively prejudicial and triggers a speedy trial analysis. *State v. Lopez*, 631 S.W.3d 107, 114, Tex.Cr.App., 2021; *Shaw v. State*, 117 S.W.3d 883, 889, Tex.Cr.App., 2003.

C(5). Reasons for the Delay

Proper procedure was not followed. The case was not transferred to the felony competency court. Noble was not given a competency evaluation after completing the jail program. 46B.091(g) [2017 statute]. There was "forum shopping" for court ordered medication. Judge Collins held a second competency trial in February, 2020 in violation of TCCP 46B.073, 46B.079, 46B.080 and 46B.085 (Subsequent Extensions Prohibited) and *Jackson v. Indiana*, 406 U.S. 715, 1972 (commitment allowed to determine prognosis for regaining competency).

I can think of no plausible reason for this tactic except to increase the pressure on the defendants to plead guilty. (*Ewell*, 383 U.S. at 126, 1966) (Justice Brennan, concurring)

Dr. Fadow in Wichita Falls diagnosed Noble with Bradycardia, a slow heart rate. Noble's pulse rate is lower than average because Noble is in better than average cardiovascular condition. Pursuit of hospitable forum for unreliable witness weighed heavily against government. (*United States v. Avalos*, 541 F.2d 1100, 1113 (5th Cir. November 4, 1976)).

Delays attributable to the Judges are included in a *Barker* Inquiry: *United States v. Carpenter*, 781 F.3d 599, 612-614 (1st Cir. 2015) (22 months. Judge failed to rule on a motion); *Hull v. State*, 699 S.W.2d 220, 224, Tex.Cr.App., 1985 (19 months. Judge did not set case for trial).

At the December, 2018 competency trial, Noble mentioned a defense that there was not evidence of a threat and mentioned the lesser charge of harassment which should have been sufficient to establish competence. App.J.72a-73a. Noble asserted his speedy trial right orally. App.J.74a. "mentally competent to make a rational defense". (*Townsend v. State*, 427 S.W.2d 55, 58, Tex.Cr.App., 1968). "comprehension sufficient to understand proceedings and make a defense". *Jackson*, 406 U.S. at 720.

Noble was incarcerated for an additional 16½ months due to the second competency trial and the trip to Terrell. The Coronavirus shutdown added 6 to 8

months. President Trump's steel tariffs angered China.

In the police interrogation, Noble mentioned the recent problems with Russia could have a bearing on Noble's prior competency issues. "they thought I was crazy, but I wasn't crazy, I was telling the truth" Sam Giancana (1960's Chicago mob boss) (CR247-248, 11/3/2019).

C(6). Provisions of Article 46B Unconstitutional

C(6)(a). 46B.086(e): Court Ordered Antipsychotic Medication

Both *Sell v. United States*, 539 U.S. 166, 2003 and 46B.086(e) have four-prong tests for forced medication for competency restoration purposes. *Sell* has higher standards than 46B.086(e). Under *Sell*, involuntary administration of medication is permitted solely for trial competency purposes, "but those instances may be rare". Medication must be substantially likely to render defendant competent. *Id.* at 180-181.

Liberty interest in not being forced to take antipsychotic medication under Fourteenth Amendment Due Process Clause. *Washington v. Harper*, 494 U.S. 210, 221-222, 1990. Involuntary medication poses serious threat to defendant's right to fair trial due to side effects. *Riggins v. Nevada*, 504 U.S. 127, 138-142, 1992 (Justice Kennedy, concurring)

Sell

1). Important government interest in bringing accused to trial for a serious crime (maximum sentence more than 6 months. *Baldwin v. New York*, 399 U.S. 66, 68-69, 1970).

2) Medication substantially likely to render defendant competent without side effects that could render trial unfair.

3) Medication necessary to restore competency. Less intrusive treatments unlikely to be successful.

4) Medication medically appropriate in light of patient's medical condition. 539 U.S. at 180-181.

486.086(e):

(1) Medication medically appropriate, side effects do not cause harm greater than benefit.

(2) compelling State interest in restoring competency

(3) no less invasive means;

(4) medication will not unduly prejudice rights to fair trial.

C(6)(b). 46B.011: Interlocutory Appeals

Determinations of competency are not appealable under 46B.011. This violates Noble's Fourteenth Amendment Due Process rights.

Federal Courts allow appeals of competency determinations under 18 U.S.C. 4241(d) as a collateral order. *United States v. Donnelly*, 41 F.4th 1102, 1104 (9th Cir. 2022); *Zedner v. United States*, 547 U.S. 489, 2006.

C(7). Dismissal with Prejudice is Remedy

Dismissal with prejudice is the remedy for violation of Sixth Amendment speedy trial right. *Cantu v. State*, 253 S.W.3d 273, 281, Tex.Cr.App., 2008 (citing *Strunk v. United States*, 412 U.S. 434, 440, 1973). The holdup, was in large part, due to institutional delay. (*Betterman v. Montana*, 578 U.S. 437, 440, 2016).

"Resolution of this case is preferable to the continued disruption and public scorn to which a defendant can be subjected". *Hull*, 699 S.W.2d at 224.

D. Ankle Monitors

Limits should be set on the use of ankle monitors as a condition of release. Wearing an ankle monitor has substantial negative effects on the person. Dallas Police Chief Eddie Garcia said ankle monitors are "useless" from a public safety standpoint. Two parolees each committed a murder while wearing an ankle monitor in Dallas County last year (Nestor Oswaldo Hernandez and Zeric Jackson). Both murders appear to have been over a woman.

D(1). Fundamental Constitutional Rights

This Court has not formally declared the Eighth Amendment prohibitions of excessive bail and cruel and unusual punishments to be applicable to the States through the Fourteenth Amendment.

McDonald cited *Schlib v. Kuebel*, 404 U.S. 357, 1971 (excessive bail) and *Robinson v. California*, 370 U.S. 660, 1962 (cruel and unusual punishment) in Footnote #12.

Schlib, 404 U.S. at 365 cited *Pilkington* which said "we take it for granted" the Eighth Amendment prohibition of excessive bail applies to the States. *Pilkington v. Howell County*, 324 F.2d 45, 46 (8th Cir. November 4, 1963).

Robinson, 370 U.S. at 366 cited *Resweber* in which the Court assumed without deciding that a violation of the Eighth Amendment "cruel and unusual punishments" prohibition would violate the Fourteenth Amendment. *Francis v. Resweber*, 329 U.S. 459, 462, 1947.

This Court should overrule *Collins v. Johnston*, 237 U.S. 502, 510-511, 1915 (Eighth Amendment prohibition against cruel and unusual punishment was a limitation on the federal government, not on the states, citing *Barron v. Baltimore*, 32 U.S. 243, 247, 1833)

D(2). Ankle Monitor Excessive, Unreasonable and Oppressive as Applied to Noble

Noble has not violated the "no contact" provision of bail. Wearing an ankle monitor is not necessary for that condition. Bail is not to be used as an instrument of oppression. TCCP 17.15(2). Electronic monitoring excessive as applied. *United States v. Polouizzi*, 697 F. Supp. 2d 381, E.D.N.Y. 2010.

Conditions of release cannot be "excessive". We compare conditions against interest Government seeks to protect. Liberty is the norm. Detention prior to trial is carefully limited exception (*United States v. Salerno*, 481 U.S. 739, 754-755, 1987). Bail set higher than reasonably calculated to fulfill the purpose is "excessive". *Stack v. Boyle*, 342 U.S. 1, 5, 1951.

Noble gained 25 pounds over the last two years. Wearing an ankle monitor hinders cardiovascular exercise and causes chronic leg pain. Noble was diagnosed with a thickened heart caused by high blood pressure in 2017 by a cardiologist.

Extended limitation on exercise harmful to prisoner's health and amounts to "cruel and unusual" punishment. Prisoner's constitutional rights are implicated. *Sweet v. South Carolina*, 529 F.2d 854, 856, 866 (4th Cir. 1975).

Noble has complained about toxic gas containing butane being pumped into his residence. Prolonged exposure to butane can elevate blood pressure. The gas causes hunger cravings similar to antipsychotic

medication, but more severe, which causes weight gain. Sweating reduces the effects of the gas.

Government concluded treatment constituted torture. (*United States v. Zubaydah*, No. 20-827, 2, 2022).

Punishment must not be degrading to the dignity of human beings. *Furman v. Georgia*, 408 U.S. 238, 271-272, 1972. Punishment must not involve unnecessary and wanton infliction of pain. (*Gregg v. Georgia*, 428 U.S. 153, 173, 1976).

D(3). Use Should be Limited

Ankle monitor use should be limited to serious crimes. *Ex Parte Pieroni*, 524 S.W.3d 252, 254, App.10, 2016 (reserved for serious offenses like murder or sexual assault). *Grady v. North Carolina*, 575 U.S. 306, 2015 (satellite monitoring for recidivist sex offenders). *State v. Grady*, 831 S.E.2d 542, 549, N.C., 2019 (lifetime use limited to egregious crimes involving child victims). *United States v. Stephens*, 594 F.3d 1033 (8th Cir. 2010) (required for pre-trial release in child pornography cases under Adam Walsh Act).

In many cases, ankle monitors aren't used for long periods of time. *Ex Parte Gingell*, 842 S.W.2d 284, Tex.Cr.App., 1992. (90 days. Unreasonable on appeal. Probation for felony theft).

D(4). ACLU Report

A 2022 study on Electronic Monitoring "EM" by American Civil Liberties Union "ACLU" concluded EM fails to demonstrably protect public safety, prevent flight, or advance rehabilitation, but has long lasting carceral effects and erodes constitutional rights. The ACLU proposes incarceration credit during periods of release with an ankle monitor[8].

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

NEIL NOBLE, Pro Se
11138 Joymeadow Dr.
Dallas, TX 75218
(214) 707-0722
Neil.noble@sbcglobal.net

[8] *Rethinking Electronic Monitoring: A Harm Reduction Guide*, American Civil Liberties Union, 2022.

APPENDIX TABLE OF CONTENTS

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APPENDIX A

Affirm as Modified and Opinion Filed December 1, 2022

[SEAL]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00326-CR

NEIL PAUL NOBLE, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 4
Dallas County, Texas
Trial Court Cause No. F18-45998

MEMORANDUM OPINION

Before Justices Molberg, Partida-Kipness, and Carlyle
Opinion by Justice Partida-Kipness

Appellant Neil Noble appeals his conviction for stalking. In numerous appellate issues, Noble contends within twelve categories: (1) sufficiency of the evidence; (2) judgment reformation; (3) constitutionality of the stalking statute; (4) denial of a speedy trial; (5) admissibility of evidence; (6) voir dire error;

(7) error during closing argument; (8) judicial bias; (9) sufficiency of the indictment; (10) denial of right to self-representation; (11) ineffective assistance of counsel; and (12) cumulative error. We affirm as modified.

PROCEDURAL HISTORY

Noble was indicted for stalking, a third-degree felony. *See* TEX. PENAL CODE § 42.072(b). The indictment alleged that "on or about and between the 16th day of October, 2018 and the 5th day of November, 2018," Noble knowingly engaged in conduct to "harass, annoy, alarm, abuse, torment, or embarrass" the complainant, Messina Madson, with repeated e-mails, obscene comments, and placing her in "fear of bodily injury or death."

Noble was found incompetent by a jury on December 12, 2018, and again on February 6, 2020. After being committed to a state mental hospital, Noble regained competence. He pleaded not guilty and proceeded to trial. A jury found Noble guilty of the charged offense and, after reaching an agreement with the State, was sentenced to ten years' imprisonment, probated for four years. This *pro se* appeal followed.

BACKGROUND

Noble was indicted in November 2018 for stalking Messina Madson, a criminal defense attorney. Trial commenced on April 26, 2021. Madson testified that on October 16, 2018, she received a birthday card via

Federal Express from Noble. She testified she found the card "weird" because it "read like a personal birthday card, but it didn't make a lot of sense and there was an invitation in it." The birthday card read "Happy Birthday to Someone who's Charming, Intelligent, Great-Looking, and Fun to be around. We're so alike it's frightening!" In the hand-written note inside, Noble said "Dear Messina, Happy Birthday. My dad said I could use his Mavericks tickets on November 2 if you want to go with me. I will take you out for breakfast and could be your companion for the day 'friends with benefits.'" He signed the card "Love, Neil." Madson showed the card to her law partner, who recognized the sender's name and told her Noble had been e-mailing her through their law firm website's client contact box.

Between October 16, 2018, and November 5, 2018, Noble e-mailed Madson fifty-one times from his personal e-mail address. Some of the early e-mails, like the birthday card, asked Madson to join Noble on a date. Other e-mails randomly referenced legal cases, news events, or would have case law citations and explanations. Madson testified she had never met Noble or represented him in any legal matter. However, the e-mails had a very familiar tone and seemed like a response to something Madson said. As the e-mails continued, they became more personal, referencing Madson coming to Noble's home, getting a hotel room together, Noble going to Madson's home, hanging drapes at Noble's home and then stating that "D" + "rape = drape," and talking about terrorist attacks, shootings, and bombings. Noble also talked about getting advice from

dead people, multiple conspiracy theories involving the Mafia, Russia, former presidents, and how he analyzed numbers.

Madson testified the nature of the e-mails alarmed her so she notified the staff at her office and security in the building about Noble. Noble continued to e-mail her and made reference to the Doubletree Hotel corporate suite, which she testified was the hotel her office was attached to, and the University of Texas soccer fields, which Madson stated were close to her home. After she received those e-mails, Madson testified her family altered their life, with her children not being allowed to play outside anymore and having to warn her son and her children's schools about Noble.

Madson also contacted the Dallas County District Attorney's Office (DA's Office) to try to get Noble to stop contacting her.[1] Noble's later e-mails referenced how he knew she had contacted the DA's office by stating "I will not voluntarily consent to a 'no-contact' provision with either Messina Madson or Jody Warner [another female attorney]." Additionally, on October 31, 2018, Noble wrote Madson stating, "You made a mistake that needs to be corrected. I will let you take me on a vacation. If you do anything else to make me look bad, I [sic] won't be as patient."

On November 2, 2018, Noble came to Madson's office telling the receptionist, Sarah Dunn, that he was there to take Madson to lunch. Dunn recognized Noble

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[1] Madson was a former prosecutor with the DA's office and still had contacts within the office.

from the picture Madson had provided and notified Taly Haffar, an attorney at the office. Haffar confronted Noble, stated Madson was not at the office, and told Noble he needed to leave. Haffar agreed during his testimony that Noble left without incident but found his behavior odd. Later that day, Noble wrote Madson and stated:

> Messina,
>
> Will you let me take you to dinner tonight for your birthday. I can also give you a key. Let me know.
>
> I came by to take you to lunch today but they wouldn't let me in. Maybe he confused a box of condoms (three) for a suicide bomb. The guy reminded me of actor tele sevalias [sic].
>
> I am at the law library. There is an annotation on competency to stand trial in the same casebook as dusky, 362 u.s. [sic].
>
> Love,
>
> Neil noble [sic] November 2, 2018.

Madson testified that this e-mail was "really scary" because she knew Noble had just been at her office.

> I'm scared and alarmed that this ha[d] escalated way beyond past where it should have, and it's sexual and it's sexual without my participation. It is getting into a sexual fantasy that has a level of familiarity that is not appropriate, not reasonable, not stable. It's just scary.

The emails continued until the following day, November 3, 2018. The last one Noble sent stated:

Messina:

> Roy Cohn[2] suggested that I ask you if you are ready for me to come over and give you a good time for your birthday. How many times would you like to have good sex with me tonight? I could probably find your house. Campbell to Coit. Would you open the door if I came over?
>
> . . . .
>
> I would rather have sex with you than fight with you, but that's up to you. When is the fun part of your next menstrual cycle? Do you want to practice before then?
>
> Happy Birthday! Love,
>
> Neil Noble November 3, 2018.

Madson testified she was out of town for her birthday, but received a panicked phone call from her husband on November 4, 2018, because Noble had shown up to their home. Anthony Pampillonia, Madson's husband, testified he was home with their children when the doorbell rang. When he opened the door, Noble was there and asked for Madson. Pampillonia told him no one by that name lived there and closed the door. Pampillonia stated Noble seemed surprised when he

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[2] Roy Cohn was an attorney from the New York area who was famous in the 1950's and involved in the McCarthy hearings. He is deceased.

opened the door. Pampillonia called 911 as Noble left. After Noble showed up at their home, her family made changes to their home security, notified the police and schools, and had more police patrols in their neighborhood. Madson testified that if she had been home, she believed Noble would have tried to "rape" her.

The jury also heard testimony from Detective Sarah Ye with the Richardson Police Department. Detective Ye testified she reviewed Pampillonia's complaint and the e-mails and birthday card Madson received. Detective Ye also spoke to Noble in a videotaped interview where he claimed ownership of the e-mail address used to send the e-mails to Madson and admitted to sending them. The jury found Noble guilty as alleged in the indictment.

ANALYSIS

Noble brings eighty-one issues on appeal that we have combined into the following categories: (1) sufficiency of the evidence to support the conviction; (2) judgment reformation; (3) constitutionality of the stalking and harassment statutes; (4) denial of a speedy trial; (5) admissibility of evidence; (6) voir dire error; (7) error during closing argument; (8) judicial bias; (9) sufficiency of the indictment; (10) denial of right to self-representation; (11) ineffective assistance of counsel; and (12) cumulative error. We will address his substantive complaints first.

I. Sufficiency of the Evidence

In his first set of issues, Noble challenges the sufficiency of the evidence to support his conviction for stalking. He also alleges the evidence was not sufficient to support a conviction for harassment and there was a variance between the indictment and evidence presented at trial.

We review a sufficiency challenge by considering all of the evidence in the light most favorable to the verdict and determine, whether, based on the evidence and reasonable inferences therefrom, a rational jury could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). We examine all the evidence in the light most favorable to the verdict and determine whether a rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. *Matlock v. State*, 392 S.W.3d 662, 667 (Tex. Crim. App. 2013). We defer to the fact finder's credibility and weight determinations because the fact finder is the sole judge of the witnesses' credibility and the weight to be given to their testimony. *See Winfrey v. State*, 393 S.W.3d 763, 768 (Tex. Crim. App. 2013). The fact finder can choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App.

2007). Evidence is sufficient if "the inferences necessary to establish guilt are reasonable based upon the cumulative force of all the evidence when considered in the light most favorable to the verdict." *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012).

We measure whether the evidence presented at trial was sufficient to support a conviction by comparing it to "the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The hypothetically correct jury charge is one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liabilities, and adequately describes the particular offense for which the defendant was tried." *Id.*; *see also Daugherty v. State*, 387 S.W.3d 654, 665 (Tex. Crim. App. 2013). The "law as authorized by the indictment" includes the statutory elements of the offense and those elements "as modified by the indictment." *Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000).

Under the Texas Penal Code, a person commits the offense of stalking if, as relevant here:

> on more than one occasion and pursuant to the same scheme or course of conduct that is directed specifically at another person, knowingly engages in conduct that:
>
> (1) constitutes an offense under Section 42.07 [harassment], or that the actor knows or

> reasonably should know the other person will regard as threatening:
>
> (2) causes the other person . . . to be placed in fear of bodily injury or death . . . or to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended; and
>
> (3) would cause a reasonable person to . . . fear bodily injury or death for himself or herself; . . . or feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended.

TEX. PENAL CODE § 42.072(a).

Section 42.07 defines the offense of harassment. A person harasses another if, "with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person," as relevant here, "initiates communication and in the course of communication makes a comment, request, suggestion, or proposal that is obscene," or "sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." *Id.* § 42.07(a)(1), (7). Section 42.07 also defines "electronic communication" as a "communication initiated through the use of electronic mail, . . . or an Internet website," and "obscene" as "a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse. . . ." *Id.*(b)(1)(A), (3).

Noble argues the evidence was not sufficient to support the jury's verdict for stalking. We disagree. The evidence showed that Noble sent over fifty e-mails

to Madson in a three-week period. Noble confirmed the e-mail address was his and admitted sending the e-mails to Madson. Madson testified she did not know Noble, was not his attorney at any point in time, and never responded to his communication. Noble escalated the situation by appearing at Madson's office stating he was taking her to lunch and then by showing up at her home. During that time, Madson reached out to the DA's office and requested a no-contact order. Noble's e-mails made clear he was aware of the no-contact order, yet he intentionally continued to reach Madson. Once he was aware of her no-contact request, Noble began making more threatening remarks towards Madson in the e-mails and frequently referenced sexual encounters. Madson stated the e-mails caused her to feel "threatened," "scared," and "alarmed." She also testified she felt like Noble was going to "rape" her.

Additionally, testimony showed that Noble repeatedly referenced having sexual intercourse with Madson. His initial birthday card to her spoke about being "friends with benefits," alluding to sexual encounters. Noble also invited Madson to his home or referred to hotels in the evening multiple times, as well as asking to come to her home. He showed up to her office with a box of condoms stating he was taking Madson to lunch. Noble also wrote her about having "good sex" for her birthday and when they could "practice." Madson was alarmed by these e-mails and notified her family, coworkers, and children's schools to warn them of Noble. A majority of these requests by Noble came after he

was aware of the no-contact order Madson requested. A rationale jury could have found that these repeated requests were alarming to Madson, obscene in nature, and sufficient to support the conviction for stalking.

Noble also challenges the sufficiency of a conviction for harassment. Harassment was presented to the jury as a lesser included offense in the jury charge. To convict for stalking, the jury had to find the elements of harassment present as well. Since we find the evidence was sufficient to support the conviction for stalking, the evidence was sufficient to support the harassment section of the stalking charge.

Noble also claims there was a variance between the indictment and the evidence presented at trial. To assert an issue on appeal, an appellant's brief must contain a "clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38. 1 (i). An appellant waives an issue on appeal if he does not adequately brief an issue by failing to provide supporting arguments, substantive analysis, and appropriate citations to authorities and to the record. *See id*; *Lucio v. State*, 351 S.W.3d 878, 896–97 (Tex. Crim. App. 2011); *see also Chaves v. State*, 630 S.W.3d 541, 555 (Tex. App.—Houston [1st Dist.] 2021, no pet.). An appellate court has no obligation to construct and compose issues, facts, and arguments with appropriate citations to authorities and the record for the appellant. *See Wolfe v. State*, 509 S.W.3d 325, 343 (Tex. Crim. App. 2017). A brief that fails to apply the law to the facts does not comport with the Rule 38.1 and presents nothing for our review. *See*

Swearingen v. State, 101 S.W.3d 89, 100 (Tex. Crim. App. 2003). Noble did not provide this Court with substantive argument, analysis, or apply the law to the facts in this issue. Therefore, we find he waived this issue.

The evidence was sufficient to support the jury's verdict for stalking. Noble's e-mails caused Madson to be "alarmed" and in fear of bodily injury. We overrule Noble's issues regarding the sufficiency of the evidence.

II. Constitutionality of the Tex. Penal Code Sections 42.07 and 42.072

In seven issues, Noble challenges the constitutionality of sections 42.07 and 42.072 stating they are vague and overbroad. He alleges the trial court judge erred by denying his motion to quash the indictment on the ground the statute was unconstitutional. He also argues sections 42.07 and 42.072 are vague and overbroad both on their face and as applied to Noble. He states sections 42.07 and 42.072 implicate First Amendment free speech protection because they seek to regulate speech. Noble also argues the term "solicitation" in section 42.07 is vague and overbroad.

When a party challenges a statute as both overbroad and vague, a court of appeals must first consider the overbreadth challenged. *Ex parte Nuncio*, 579 S.W.3d 448, 453 (Tex. App.—San Antonio 2019), *aff'd*, No. PD-0478-19, 2022 WL 1021276 (Tex. Crim. App. Apr. 6, 2022); *Ex parte Paxton*, 493 S.W.3d 292, 304 (Tex.

App.—Dallas 2016, pet. ref'd). "The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others." *Ex parte Barton*, ___ S.W ___. ___, PD-1123-19, 2022 WL 1021061, at *2 (Tex. Crim. App. April 2, 2022) (quoting *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989)). The overbreadth doctrine "is strong medicine that is used sparingly and only as a last resort." *Nuncio*, 579 S.W.3d at 453 (quoting *State v. Johnson*, 475 S.W.3d 860, 865 (Tex. Crim. App. 2015)). To qualify as unconstitutionally overbroad, "the statute must prohibit a substantial amount of protected expression and the danger that the statute will be unconstitutionally applied must be realistic and not based on 'fanciful hypotheticals.'" *Id.* at 453–54 (quoting *United States v. Stevens*, 559 U.S. 460, 485 (2010)). Laws restricting the exercise of rights under the First Amendment are facially overbroad only if the impermissible applications of the law are real and substantial when judged in relation to the statute's legitimate sweep. *Id.* at 454. "[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad." *Barton*, 2022 WL 1021061, at *2 (quoting *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984)). Appellate courts should uphold a challenged statute if it can ascertain a reasonable construction that renders it constitutional. *Nuncio*, 579 S.W.3d at 454.

Generally, "in addressing a vagueness challenge," courts are to "consider whether the statute is vague as

applied to a defendant's conduct before considering whether the statute may be vague as applied to the conduct of others." *Barton*, 2022 WL 1021061, at *2 (quoting *Wagner v. State*, 539 S.W.3d 298, 314 (Tex. Crim. App. 2018). "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Id.* (internal quotations omitted).

This general rule gives way when freedom of speech under the First Amendment is involved. *Barton*, 2022 WL 1021061, at *3. "[W]hen a vagueness challenge involves First Amendment considerations, a criminal law may be held facially invalid even though it may not be unconstitutional as applied to the defendant's conduct." *State v. Doyal*, 589 S.W.3d 136, 144 (Tex. Crim. App. 2019) (internal quotations omitted). A law implicating First Amendment freedoms may be found facially vague without "a showing that there are no possible instances of conduct clearly falling within the statute's prohibitions." *Id.* at 145.

The court of criminal appeals in their recent decisions in *Barton*, 2022 WL 1021061, at *1, and *Ex parte Sanders*, ___ S.W.3d ___, ___, 2022 WL 1021055, at *1 (Tex. Crim. App. April 6, 2022), have addressed similar issues to Noble's complaints. In *Barton*, the Court held that section 42.07(a)(7), the electronic harassment statute, "fails to implicate the First Amendment's freedom of speech protections because it . . . prohibits

non-speech conduct." 2022 WL 1021061, at *1. It found that the holding in *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010), *disavowed on other ground by Wilson v. State*, 448 S.W.3d 418, 423 (Tex. Crim. App. 2014), applied to Section 42.07(a)(7) as well as Section 42.07(a)(4) because both involve non-speech conduct that does not implicate the First Amendment. *Barton*, 2022 WL 1021061, at *6. It also held that "sending repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend would indeed invade the substantial privacy interest of another in an essentially intolerable manner." *Id.* at *7; *Sanders*, 2022 WL 1021055, at *3. As for whether the statute is unconstitutionally vague because Section 42.07(a)(7) does not regulate speech and therefore "does not implicate the free-speech guarantee of the First Amendment," Noble, like the appellant in *Barton*, "in making his vagueness challenge to that statutory subsection, was required to show that it was unduly vague as applied to his own conduct." *Barton*, 2022 WL 1021061, at *7. Noble has not done that and, therefore, his vagueness challenge fails. Additionally, because the Court held that First Amendment speech protections do not apply under this section, Noble's overbreadth challenges fail as well.

Although this Court previously decided in *Griswold v. State (Griswold I)*, 637 S.W.3d 888 (Tex. App.—Dallas 2021, pet. filed), that section 42.072(a) was "facially unconstitutional for vagueness and overbreadth to the extent that it incorporates section 42.07(a)(7),"

that decision has been overruled. *Griswold v. State (Griswold II)*, ___ S.W.3d ___, ___, 2022 WL 16626079, at *1 (Tex. Crim. App. Nov. 2, 2022) (mem. op.). In *Griswold II*, the court of criminal appeals reversed and remanded *Griswold I* back to this Court for further consideration because we did not have the benefit of *Barton* and *Sanders*, which "upheld the facial constitutionality of a previous version of section 42.07(a)(7)." *Griswold II*, 2022 WL 16626079, at *1. Noble's arguments rely heavily on *Griswold I*, which has now been overruled. Therefore, based on the recent decisions out of the court of criminal appeals, Noble's arguments fail to the extent they rely on *Griswold I*.

Noble also challenges whether "solicitation" is vague or overbroad. However, he failed to adequately brief this issue. To assert an issue on appeal, an appellant's brief must contain a "clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). An appellant waives an issue on appeal if he does not adequately brief an issue by failing to provide supporting arguments, substantive analysis, and appropriate citations to authorities and to the record. *See id.* We find this issue to be waived.

III. Speedy Trial Complaint

In fourteen issues related to speedy trials, Noble argues the trial court committed error by not granting his motion for speedy trial.

The Sixth Amendment to the United States Constitution guarantees the accused in a criminal prosecution the right to a speedy trial. *State v. Lopez*, 631 S.W.3d 107, 113 (Tex. Crim. App. 2021). The Texas Constitution has the same guarantee. *Id.* An evaluation of a speedy trial claim includes a consideration of "the length of delay, the reasons for delay, to what extent the defendant has asserted his right, and any prejudice suffered by the defendant." *Hopper v. State*, 520 S.W.3d 915, 924 (Tex. Crim. App. 2017) (citing *Barker v. Wingo*, 407 U.S. 514, 530-32, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)). Moreover, "[t]he length of delay is, to some extent, a triggering mechanism, so that a speedy trial claim will not even be heard until passage of a period of time that is, on its face, unreasonable in the circumstances." *Dragoo v. State*, 96 S.w.3d 308, 313 (Tex. Crim. App. 2003).

We apply a bifurcated standard of review: an abuse of discretion standard for the factual components and a de novo standard for the legal components. *Lopez*, 631 S.W.3d at 113–114. While an evaluation of the *Barker* factors includes fact determinations and legal conclusions, "the balancing test as a whole is a purely legal question that we review *de novo*." *Id.* at 114 (quoting *Balderas v. State*, 517 S.W.3d 756, 767–68 (Tex. Crim. App. 2016). Because Noble did not request findings of fact and conclusions of law, we imply all findings necessary to support the trial court's ruling if those findings are supported by the record. *See Balderas*, 517 S.W.3d at 767–68.

a. Length of Delay

The first factor requires us to measure the delay from the time the defendant was formally accused or arrested until the time of trial. *Lopez*, 631 S.W.3d at 114. There is "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." *Barker*, 407 U.S. at 523. Indeed, the length of delay that will provoke an inquiry into the speedy trial factors "is necessarily dependent upon the peculiar circumstances of the case." *Zamorano v. State*, 84 S.W.3d 643, 648-49 (Tex. Crim. App. 2002) (quoting *Barker*, 407 U.S. at 530-31). Deliberate delay to hamper the defense weighs heavily against the State, while more neutral reasons like negligence or overcrowded courts weigh against the State but less heavily. *Hopper*, 520 S.W.3d at 924.

Although "[t]here is no set time element that triggers the analysis," *Cantu v. State*, 253 S.W.3d 273, 281 (Tex. Crim. App. 2008), generally, a delay of eight months to a year, or longer, is presumptively prejudicial and triggers a speedy trial analysis. *Shaw v. State*, 117 S.W.3d 883, 889 (Tex. Crim. App. 2003); *Harris v. State,* 827 S.W.2d 949, 956 (Tex. Crim. App. 1992).

Noble was arrested on November 7, 2018, and indicted on November 13, 2018, for stalking. A month later, he was found incompetent by a jury and committed to a state hospital facility to attempt to regain competency. In February 2019, Noble filed a *pro se* motion for speedy trial. In May 2019, Noble's commitment was extended because he was still determined to be

incompetent to stand trial. In October 2019, the hospital determined Noble was competent to stand trial and the trial court restored his competency. On October 30, 2019, the trial court ordered a second competency evaluation. On November 12, 2019, Noble filed another *pro se* motion for speedy trial. In February 2020, a second competency trial was held, and Noble was again found to be incompetent by a jury. He was re-committed to a state hospital facility. In October 2020, Noble filed a *pro se* motion to dismiss due to speedy trial violations. Also in late October 2020, the hospital submitted an evaluation that Noble's competency was restored. In November 2020, Noble filed another *pro se* motion for speedy trial. The trial court restored his competency in January 2021. In March 2021, Noble requested a speedy trial and dismissal for denial of his speedy trial rights. Trial commenced in April 2021.

The timeline shows there was a substantial delay between the date of arrest and the date of trial. The delay was sufficient to trigger analysis under the *Barker* factors.

b. Reasons for the Delay

Once the length of time is found to be possibly prejudicial, the burden on justifying the delay falls to the State. *Cantu*, 253 S.W.3d at 280. Deliberate delays weigh heavily against the State, while more neutral reasons weigh less heavily. *Barker*, 407 U.S. at 531; *Zamorano*, 84 S.W.3d at 649. Valid reasons are not weighed against the State at all. *Barker*, 407 U.S. at

531; *State v. Munoz*, 991 S.W.2d 818, 824 (Tex. Crim. App. 1999). Caselaw is clear that delays related to competency evaluations do not count against the State. *Lopez*, 631 S.W.3d at 112; *see Hull v. State*, 699 S.W.2d 220, 221–22 (Tex. Crim. App. 1985).

Here, shortly after Noble was arrested, he was deemed incompetent. After an extension and second commitment for incompetency, he was finally deemed competent in January 2021. Trial was held in April 2021 and Noble's was the first criminal trial held in Dallas County following the Covid-19 pandemic.

No portion of the delay should be held against the State. It filed one continuance prior to trial because Madson was unavailable, but the continuance was denied. Trial proceeded as scheduled. These factors weigh in favor of the State.

c. Noble's Assertion of his Speedy Trial Rights

Noble asserted his right to a speedy trial multiple times. However, three of those motions were filed while he was deemed incompetent and committed to a state hospital facility. If the court determines there is evidence to support a finding of incompetency, "all other proceedings in the case" shall be stayed, other than acting on the State's motion to dismiss. TEX. CODE CRIM. PROC. art. 46B.004(d), (e); *see State v. Suarez*, No. 08-17-00060-CR, 2018 WL 4178460, at *4 (Tex. App.—El Paso Aug. 31, 2018). Therefore, those motions should be considered stayed, and we will only consider motions after Noble regained competency. His trial counsel filed

a motion for speedy trial in March 2021, and Noble filed a *pro se* motion to dismiss days after. His trial commenced on April 26, 2021. Because we have already determined that the time he spent awaiting competency evaluations and treatment do not count towards the determination of any speedy trial violation, only a period of about three and a half months passed between competency being restored and trial. Therefore, this factor weighs in favor of the State.

d. Prejudice to Noble

Even though time passed between Noble's arrest and trial, he fails to show how he was prejudiced by the State's actions. Noble was arrested and found incompetent to stand trial shortly after. He was committed to a state hospital facility to regain competency. Although the State requested a short continuance prior to trial, it was denied and the State proceeded to trial. There was no prejudice to Noble for a speedy trial violation. We overrule Noble's issues relating to his speedy trial complaint.

Additionally, under his "Issues Presented" section, Noble raises multiple complaints about his competency hearings. Noble did not provide this Court with substantive argument, analysis, or apply the law to the facts in these issues. Therefore, we find his issues regarding his competency hearings are waived. *See* TEX. R. APP. P. 38.1(1); *see also Wolfe*, 509 S.W.3d at 343; *Lucio*, 351 S.W.3d at 896–97; *Swearingen*, 101 S.W.3d at 100.

IV. Ineffective Assistance of Counsel

Noble alleges his trial counsel was ineffective. His argument about this issue is stated in four sets of questions. Specifically, he asks whether trial counsel's performance made it "less likely that he would be found not guilty or only found guilty of the lesser offense of harassment" and if trial counsel's performance had an effect on sentencing. Noble also argues that trial counsel's "rude comment" about a former client of Madson's constituted a "single egregious error justifying reversal." Finally, he states trial counsel should have investigated his preferred defense and he did not fully understand the plea agreement based on trial counsel's explanation.

To prevail on a claim of ineffective assistance of counsel, the appellant must meet a two-pronged test established in *Strickland v. Washington*. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011) (citing *Strickland*, 466 U.S. 668, 686 (1984)). Appellant must show (1) counsel's representation fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense. *Id.* Unless appellant can prove both prongs, an appellate court must not find counsel's representation to be ineffective. *Id.* In order to satisfy the first prong, appellant must prove, by a preponderance of the evidence that trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms. To prove prejudice, appellant must show there is a reasonable probability, or a probability sufficient

to undermine confidence in the outcome, that the result of the proceeding would have been different. *Id.*

An appellate court must make a "strong presumption that counsel's performance fell within the wide range of reasonably professional assistance." *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). In order for an appellate court to find that counsel was ineffective, counsel's deficiency must be affirmatively demonstrated in the trial record; the court must not engage in retrospective speculation. *Thomas v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). "It is not sufficient that appellant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence." *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007). When such direct evidence is not available, we will assume counsel had a strategy if any reasonably sound strategic motivation can be imagined. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). In making an assessment of effective assistance of counsel, an appellate court must review the totality of the representation and the circumstances of each case without the benefit of hindsight. *Lopez*, 343 S.W.3d at 143.

In the rare case in which trial counsel's ineffectiveness is apparent from the record, an appellate court may address and dispose of the claim on direct appeal. *Id.* However, this is a difficult hurdle to overcome: the record must demonstrate that counsel's performance fell below an objective standard of reasonableness as a matter of law, and that no reasonable trial strategy

could justify trial counsel's acts or omissions, regardless of his or her subjective reasoning. *See Strickland*, 466 U.S. at 690.

Noble argues trial counsel did not understand the law regarding stalking and instead of "recognizing the State didn't prove its case, [trial counsel] took a hostile approach on cross-examination of Madson." Noble feels that tactic "alienated the jury." Noble makes statements in his briefs regarding what trial counsel did, without showing how the conduct was so "outrageous" that no attorney would have proceeded in the same manner. He also argues trial counsel did not properly explain the plea agreement to him and his sentencing should be void. Without a chance to respond to Noble's allegations, we do not know what occurred between Noble and trial counsel regarding the sentencing plea agreement.

"Direct appeal is usually an inadequate vehicle for raising such a claim because the record is generally undeveloped." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Trial counsel "should ordinarily be afforded an opportunity to explain [her] actions before being denounced as ineffective." *Id.* Here, trial counsel was not given a chance to respond to these allegations. Based on the record before us, we find the challenged conduct was not "so outrageous that no competent attorney would have engaged in it." *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012) (quoting *Goodspeed*, 187 S.W.3d at 392).

Noble has not shown trial counsel's actions were "so outrageous that no competent attorney would have engaged in it." *Id.* His four issues relating to ineffective assistance of counsel are overruled.

V. Admissibility of Evidence

By multiple issues, Noble alleges the trial court erred by admitting certain pieces of evidence: the e-mails he sent to Madson, his videotaped statement with Richardson Police, and the birthday card he sent Madson. He also argues Detective Ye's opinion regarding the charges brought against Noble was inadmissible.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Id.* at 83. Before a reviewing court may reverse a trial court's evidentiary ruling, it must conclude that the trial court's ruling "was so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Id.* (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008)).

Whether to admit a particular piece of evidence is a preliminary question to be determined by the trial court. *See* TEX. R. EVID. 104(a) ("The court must decide any preliminary question about whether . . . evidence is admissible."); *Tienda v. State*, 358 S.W.3d 633, 637–38 (Tex. Crim. App. 2012). For evidence to be admissible,

it must be relevant. A key component of relevance is authentication: "Evidence has no relevance if it is not authentically what its proponent claims it to be." *Tienda*, 358 S.W.3d at 638. Authentication is a condition precedent to the admissibility of evidence and requires the proponent of the evidence to "produce evidence sufficient to support a finding that the item is what the proponent claims it is." TEX. R. EVID. 901; *Butler v. State*, 459 S.W.3d 595, 600 (Tex. Crim. App. 2015). Evidence can be authenticated by appearance, content, substance, internal patterns, or other distinctive characteristics, including direct or circumstantial evidence. *Hines v. State*, 608 S.W.3d 354, 365 (Tex. App.—Houston [1st Dist.] 2020, no pet.).

The ultimate question of whether a particular item of evidence is what its proponent claims is a question for the fact finder. *Tienda*, 358 S.W.3d at 638. As part of its gate-keeping function, the trial court's preliminary question is to decide whether the proponent of the evidence has supplied facts to support a reasonable jury determination that the evidence proffered is authentic. *Id.* If the trial court's ruling that the jury could find the evidence authentic is "within the zone of reasonable disagreement," we should not interfere and reverse the ruling. *Id.*; *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007) ("The trial judge does not abuse his or her discretion in admitting evidence where he or she reasonably believes that a reasonable juror could find that the evidence has been authenticated or identified.").

Noble first objects to the admission of the e-mails he sent Madson into evidence. As the State introduced the e-mails, Noble's counsel objected on Rule 404(b) grounds and attorney-client privilege grounds. *See* TEX. R. EVID. 404(b). On appeal, Noble now argues the e-mails were not properly authenticated under Rule 901. *See id.* R. 901. The objection raised on appeal must comport with the objection raised at trial; otherwise, nothing is preserved for appellate review. *See* TEX. R. APP. P. 33.1; *see Gibson v. State*, 541 S.W.3d 164, 166 (Tex. Crim. App. 2017). Because Noble's current issue is not on the same grounds his trial counsel raised, we find this issue is waived.

Noble next argues his videotaped interview should not have been admissible. Noble's argument, outside of some brief facts and a "legal standard" states "Noble would not have given a statement if there had not been the pressure of competency proceedings. Noble's statement was not 'voluntary' and the tape should be permanently excluded." To assert an issue on appeal, an appellant's brief must contain a "clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). Additionally, Noble also argues the birthday card he sent to Madson should be excluded because Detective Ye did not bring the original to court and the card was not "mentioned in the indictment." Noble also does not adequately brief either of these arguments. *See* TEX. R. APP. P. 38.1(i). We do not have an obligation to construct and argue Noble's issues for him. *See*

Wolfe, 509 S.W.3d at 343. We find that these issues were not preserved and are therefore, waived.

He also challenges Detective Ye's opinion testimony regarding the stalking charge. His trial counsel did not object to the State's questioning of Detective Ye. To preserve an issue, Noble must timely object before the trial court and receive an adverse ruling. *See* TEX. R. APP. P. 33.1(a). Noble did not object and therefore no issue was preserved. This issue is overruled.

In his "Issues Presented" section of his brief, Noble also lists nine additional issues related to the pieces of evidence addressed above. However, outside of listing these issues, Noble does not address them any further in his brief or supplemental briefs. Therefore, we will not address those issues and deem them inadequately briefed and waived. *See* TEX. R. APP. P. 38.1(I).

VI. Voir Dire

Noble alleges in six issues that the trial court erred during voir dire. He states the trial court inappropriately dismissed Jurors 3, 26, and 28, the jury was organized to "convict" him, the State committed error by raising a Texas Tech coffee cup, Juror 45 was "planted" on the jury, and the State conducted a "mock trial" to exclude jurors who were "skeptical of his case."

Following voir dire, the attorneys presented their challenges for cause to the trial court. When Juror 3's number came up, the following discussion occurred:

Trial Court:	No. 2, can't be fair. 3, I made a terrible mistake.
Trial Counsel:	No problem.
Trial Court:	I thought we were talking about a different person. And then 5–
State:	No 3?
Trial Counsel:	Yeah, [the trial court] accidentally dismissed 3.
Noble:	I liked him.
Trial Counsel:	It happens. No. 4?
	. . . .
Trial Court:	And to be fair, [Juror 3] was the person who said his sister, mother, and all those people had that kind of problem.
Trial Counsel:	Yeah. And he had a juvenile conviction. He was on his way out.

Although the trial court accidentally excused Juror 3, trial counsel did not object and even agreed he would have been dismissed. Juror 28 was excused from the jury based on her statements during voir dire that she would have difficulty with this particular type of case, as well as having a scheduling issue. There was no objection by trial counsel. These alleged errors were not preserved for review. *See* TEX. R. APP. P. 33.1(a).

Juror 26 was questioned individually and the record does not show that Juror 26 was struck for cause. Therefore, the trial court did not err because it did not excuse Juror 26 for cause. Additionally, Noble does not adequately brief his issue regarding Juror 26. Therefore, we find his issue was waived. *See* TEX. R. APP. P. 38.1(i).

Noble also argues the State committed error when the prosecutor raised his Texas Tech coffee mug and alleges Juror 45 was "planted" on the jury panel. These issues were also not objected to or adequately briefed. *See id.* In his "Issues Presented" section of his brief, Noble also lists two additional issues related to voir dire. However, outside of listing these issues, Noble does not address them any further in his brief or supplemental briefs. Therefore, we will not address them and deem them inadequately briefed and waived. *See id.*

VII. Closing Arguments

Noble brings four issues regarding closing arguments in his "Issues Presented" section: the State erred when it misstated the definition of "obscene," the State erred by misstating the number of times Noble asked Madson for sex and discussed terrorism and Mafia events, and the trial court erred by overruling trial counsel's objection to a part of the State's closing argument.

In his brief, Noble briefly discusses facts from the State's closing argument. In his "Case Law" section, he

cites to three cases, but never ties them to the facts he discussed previously nor does he make an argument about how the cases are applicable. This entire section is inadequately briefed and waived. *See id.*; *Swearingen*, 101 S.W.3d at 100.

VIII. Trial Court's Other Errors and Bias

Noble raises six issues regarding the trial court's supposed errors or bias. He states the trial court erred by excluding Defense Exhibits 1 and 2 and by giving a deficient jury instruction regarding reasonable doubt. He also claims it erred by making statements to the jury about the Dallas Cowboys and Campisi's Restaurant. He additionally asserts he was denied his right to an impartial judge.

In his brief, Noble states he believed the trial court was biased against him and he filed a motion to recuse that was not heard by the trial court. He also wanted to provide the jury with a motion to quash challenging the constitutionality of the harassment statute he filed as Defense Exhibit 1, and with a copy of the opinion in *Ex parte Barton* as Defense Exhibit 2. He alleges the motion to quash would have shown the jury he was seeking to hire Madson as his defense counsel in an unrelated harassment case.

Noble does not direct us to any portion of the record that indicates he made a request, objection, or motion based on the trial judge's alleged bias. *See* TEX. R. APP. P. 33.1(a) (requiring a timely request, objection, or motion to preserve a complaint for appellate review).

He did not file a motion to recuse the trial judge or seek a new trial on the basis of bias.

Only two categories of errors may be raised for the first time on appeal: (1) violations of rights which are waivable only and (2) denials of fundamental systemic requirements. *Proenza v. State*, 541 S.W.3d 786, 798 (Tex. Crim. App. 2017) (citing *Marin v. State*, 851 S.W.2d 275, 280 (Tex. Crim. App. 1993), *overruled on other grounds, Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997)). The Texas Court of Criminal Appeals rejected any common law "fundamental error" exception to the rules of error preservation based upon harm, holding the question of error preservation instead turns upon the "nature" of the error itself. *Proenza*, 541 at 796 (citing *Marin*, 851 S.W.2d at 278-80.).

Due process requires a neutral and detached hearing body or officer. *Brumit*, 206 S.W.3d at 645 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973)). A defendant has an absolute right to an impartial judge at both the guilt-innocence and punishment phases of trial. *Segovia v. State*, 543 S.W.3d 497, 503 (Tex. App.—Houston [14th Dist.] 2018, no pet.). A judge should not act as an advocate or adversary for any party. *Johnson v. State*, 452 S.W.3d 398, 405 (Tex. App.—Amarillo 2014, pet. ref'd). To reverse a judgment on the ground of improper conduct or comments of the judge, we must be presented with proof (1) that judicial impropriety was in fact committed, and (2) of probable prejudice to the complaining party. *Id.* Absent a clear showing of bias, a trial court's actions are presumed correct.

Brumit, 206 S.W.3d at 645. In conducting this review, we examine the entire record. *Id.*

We need not determine whether the alleged error requires an objection under *Marin* because, after reviewing the record, we find no apparent bias or partiality. *See Brumit v. State*, 206 S.W.3d 639, 644–45 (Tex. Crim. App. 2006) (declining to decide whether an objection is required to preserve an error of this nature where the record did not reflect partiality of trial court); *Graves v. State*, No. 05-19-00786-CR, 2021 WL 1558740, at *1–2 (Tex. App. Apr. 21, 2021).

Noble complains that the trial court rejected his request to publish Defense Exhibit 1 and 2 to the jury. The trial court stated the exhibits would cause unnecessary confusion to the jury as one was a motion from an unrelated case and the other exhibit was case law. *See* TEX. R. EVID. 403 (evidence can be excluded if the probative value is outweighed by a danger of confusing the jury). We conclude there was no error or bias stemming from this decision. These issues are overruled.

Noble also states the trial court erred by not including his requested jury charge instruction. Although Noble filed a motion requesting a reasonable doubt instruction be included, we do not find anywhere in the record where he presented this motion to the trial court or made an oral request to include the instruction. This issue is not preserved and is waived. *See* TEX. R. APP. P. 33.1(a).

Noble complains the trial court showed bias by making comments that they would not have court so

she could "present a gift to the Dallas Cowboys" through the veterans program. He also argued the trial court showed bias by stating that it was going to order the jury lunch from Campisi's Restaurant, because Noble believed that restaurant had ties to the Mafia. There was no objection made to these remarks and Noble fails to explain the bias he faced from these remarks. *See id.* These issues were not preserved and are waived. *Id.*

IX. Sufficiency of the Indictment

By thirteen issues, Noble challenges the sufficiency of the indictment. Prior to trial, Noble filed at least four *pro se* motions to quash the indictment. Three of those motions challenged the sufficiency of the indictment. The fourth challenged the constitutionality of the stalking and harassment statutes.

The Texas and United States Constitutions grant a criminal defendant the right to fair notice of the specific charged offense. *State v. Barbernell*, 257 S.W.3d 248, 250 (Tex. Crim. App. 2008). To provide this fair notice, the charging instrument must convey sufficient information to allow the accused to prepare a defense. *State v. Ross*, 573 S.W.3d 817, 820 (Tex. Crim. App. 2019). An indictment must set forth an offense "in plain and intelligible words." TEX. CODE CRIM. PROC. art. 21.02.

> An indictment shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a

> manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court, on conviction, to pronounce the proper judgment.

Id. art. 21.11. An indictment that tracks the language of the statute usually gives sufficient notice. *State v. Jarreau*, 512 S.W.3d 352, 354 (Tex. Crim. App. 2017). A defendant forfeits the right to complain about any defect, error, or irregularity of form or substance in an indictment if he fails to object before trial commences. TEX. CODE CRIM. PROC. art. 1.14. We review a challenge to quash an indictment *de novo*. *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004). *Barbernell* prescribed a two-step analysis for evaluating the adequacy of an indictment's allegations. "First, a court must identify the elements of an offense." 257 S.W.3d at 255. Second, if an element of the offense describing an act or omission by the defendant has been defined by the Legislature, a court must ask whether the statute provides "alternative manners or means in which the act or omission can be committed." *Id.* If so, then the pleading "will supply adequate notice only if, in addition to setting out the elements of an offense, it also alleges the specific manner and means of commission that the State intends to rely on at trial." *Id.*; *Jarreau*, 512 S.W.3d at 354–55.

Noble filed multiple *pro se* motions to quash where he challenged the sufficiency of the indictment. He filed another motion to quash where he challenged the

constitutionality of the stalking and harassment statutes. Prior to voir dire, Noble's trial counsel presented one of his motions to quash to the trial court. That particular motion challenged the constitutionality of the stalking and harassment statutes only, and was denied by the trial court. Trial counsel never brought the motions to quash dealing with the sufficiency of the indictment before the trial court for ruling. Therefore, those issues are waived. *See* TEX. R. APP. P. 33.1(a).

Had trial counsel sought a ruling on all of Noble's filed motions to quash, however, the result would be the same because the indictment was sufficient. The indictment stated:

> That NEIL PAUL NOBLE, hereinafter called Defendant, on or about and between the 16th day of October, 2018 and the 5th day of November, 2018 in the County of Dallas, State of Texas, did did [sic] then and there on more than one occasion and pursuant to the same scheme or course of conduct that was directed specifically at another person, namely Messina Madson, hereinafter called the Complainant, knowingly engage in conduct, namely:
>
> - the Defendant, with intent to harass, annoy, alarm, abuse, torment, or embarrass the Complainant, sent repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, and offend the Complainant; and

> • the Defendant, with intent to harass, annoy, alarm, abuse, torment, or embarrass the Complainant, initiated communication and in the course of the communication made a comment, request, suggestion, or proposal that was obscene;
>
> and this conduct was conduct that:
>
> • constituted an offense under Section 42.07, Penal Code, and that the Defendant knew or reasonably should have known the Complainant would regard as threatening bodily injury or death for the Complainant; and
>
> • caused the Complainant: to be placed in fear of bodily injury or death;
>
> and to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended; and
>
> • would cause a reasonable person to:
>
> fear bodily injury or death for himself or herself; and
>
> feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended.

The indictment properly tracked both the stalking and harassment statutes, and sufficiently described the offense as charged. *See Hughitt v. State*, 583 S.W.3d 623, 626 (Tex. Crim. App. 2019). The State was not required to allege all evidentiary facts it relied in the charging instrument. *State v Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004).

Noble also lists multiple other issues in his "Issues Presented" section under the "Sufficiency of the Indictment" heading. However, these issues are briefly mentioned but not further developed in his multiple briefs. Therefore, we find them to be inadequately briefed and waived. *See* TEX. R. APP. P. 38.1

X. Self-Representation

Noble raises three issues related to his desire to represent himself in the proceedings. He states the trial court committed error by not allowing him to represent himself, and the competency proceedings were a pretext to deprive him of his right to self-representation. He also requests in his brief to this Court that the Texas Court of Criminal Appeals reconsider a previous ruling.

Noble states in his amended brief that he mailed a request to represent himself in March 2020, but it was never filed. He mailed an "update" which was filed but makes no reference to his exercise of his right to self-representation. The appellate record contains no hearings or references to Noble wishing to represent himself during his proceedings. He never asked the trial court to set a hearing on any motion to represent himself nor did his trial counsel state that Noble wished to represent himself.

By not requesting a hearing before the trial court on his "requests" to represent himself, there is nothing preserved for appellate review. *See* TEX. R. APP. P.

33.1(a). Noble's issues related to self-representation are waived.

XI. Cumulative Error

Noble also asserts the "totality of errors effected the fairness of the proceeding and the reliability of the result."

It is true that a number of errors, although harmless when considered independently, may be harmful in their cumulative effect. *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999). However, there is "no authority holding that non-errors may in their cumulative effect cause error." *Gamboa v. State*, 296 S.W.3d 574, 585 (Tex. Crim. App. 2009); *see Temple v. State*, 342 S.W.3d 572, 612 (Tex. App.—Houston [14th Dist.] 2010), *aff'd*, 390 S.W.3d 341 (Tex. Crim. App. 2013) (providing that reviewing courts do not consider the effect of waived errors under the cumulative error doctrine). Because we have found no error, Noble's cumulative error argument also fails.

XII. Reformation of the Judgment

Finally, Noble also argues that the judgment should be reformed to correctly reflect a jury verdict of guilty instead of "Judgment of Conviction by Court—Wavier of Jury Trial." The State agrees. Noble was tried and convicted by a jury. An agreement on punishment was reached with the State and Noble's sentence was assessed by the trial court. Additionally, the

judgment shows that Noble pleaded guilty to the offense. However, he pleaded not guilty prior to the start of his trial.

We have the power to modify a judgment to speak the truth when we have the necessary information to do so. TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd) (en banc).

We sustain this issue and modify the judgment to state "Judgment of Conviction by Jury" in the heading and to show that Noble pleaded "Not Guilty" under the section title "Plea to the Offense."

Noble also alleges the judgment should be reformed to reflect a sentence of four years, instead of a probated sentence of ten years' imprisonment, probated for four years, jail credit for his time in custody, and a removal of the condition of probation requiring a GPS ankle monitor, house arrest, and outpatient substance abuse treatment. We decline. Noble did not complain of these three issues at the time of his sentencing; therefore, he waived his right to complain of them on appeal. *See* TEX. R. APP. P. 33.1(a). Additionally, Noble stated he understood the terms of probation when asked by the trial court and raised no other objections regarding those terms of probation. His additional three issues regarding the judgment are overruled.

CONCLUSION

For the foregoing reasons, we affirm the judgment as modified.

/s/ /Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)
210326F.U05

APPENDIX B

[SEAL]

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

NEIL PAUL NOBLE, Appellant No. 05-21-00326-CR V. THE STATE OF TEXAS, Appellee	On Appeal from the Criminal District Court No. 4, Dallas County, Texas Trial Court Cause No. F18-45998. Opinion delivered by Justice Partida-Kipness. Justices Molberg and Carlyle participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

> to state "Judgment of Conviction by Jury" in the heading and to show that Noble pleaded "Not Guilty" under the section title "Plea to the Offense."

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 1st day of December 2022.

APPENDIX C

Order entered December 1, 2022

[SEAL]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00326-CR

NEIL PAUL NOBLE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 4
Dallas County, Texas
Trial Court Cause No. F18-45998

ORDER

The following five motions are before the Court: (1) Appellant's Motion to Remove Ankle Monitor, (2) Appellant's Supplemental Motion to Remove Ankle Monitor, (3) Appellant's 2nd Supplemental Motion to Remove Ankle Monitor, (4) Appellant's Motion to Supplement his brief, and (5) Appellant's Objection to Denial of Oral Argument. The Court issued its opinion in this appeal on December 1, 2022. We, therefore, **DENY** Appellant's motions as moot and **OVERRULE** his

APPENDIX D

Order entered December 30, 2022

[SEAL]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00326-CR

NEIL PAUL NOBLE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 4
Dallas County, Texas
Trial Court Cause No. F18-45998

ORDER
Before the Court En Banc[1]

Before the Court is appellant's December 14, 2022 motion for reconsideration en banc. Appellant's motion is **DENIED**.

/s/ ROBERT D. BURNS, III
CHIEF JUSTICE

---

[1] Miskel, J., not participating.

APPENDIX E

Order entered January 4, 2023

[SEAL]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00326-CR

NEIL PAUL NOBLE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 4
Dallas County, Texas
Trial Court Cause No. F18-45998

ORDER

Before Justices Molberg, Partida-Kipness, and Carlyle

Before the Court is appellant's December 5, 2022 motion for rehearing. Appellant's motion is **DENIED**.

/s/ ROBBIE PARTIDA-KIPNESS
JUSTICE

APPENDIX F

Order entered January 4, 2023

[SEAL]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00326-CR

NEIL PAUL NOBLE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 4
Dallas County, Texas
Trial Court Cause No. F18-45998

ORDER

Before Justices Molberg, Partida-Kipness, and Carlyle

Before the Court is Noble's "Petition for Rehearing Motion to Remove Ankle Monitor as a Condition of Bail." We **DENY** the motion.

/s/ ROBBIE PARTIDA-KIPNESS
JUSTICE

APPENDIX G

FILE COPY

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

[SEAL]

2/22/2023 **COA No. 05-21-00326-CR**
NOBLE, NEIL PAUL **PD-0021-23**
Tr. Ct. No. F18-45998

On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Deana Williamson, Clerk

NEIL NOBLE
11138 JOYMEADOW DRIVE
DALLAS, TX 75218
* DELIVERED VIA E-MAIL & POSTAL *

APPENDIX H

Constitutional and Statutory Provisions Involved

Rule 14(1)(f)

I. United States Constitution

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble.

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation."

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required,. . . . nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any state deprive any person of life, liberty, or property, without due process of law."

II. Texas Constitution

Article 1, Section 10 of the Texas Constitution provides in pertinent part: "In all criminal prosecutions the accused shall have a speedy public trial . . . He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof . . . and no person shall be held to answer for a criminal offense unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary."

Article 1, Section 11 of the Texas Constitution provides: "All prisoners shall be bailable . . . unless for capital offences, when the proof is evident;"

III. Texas Rules of Appellate Procedure

Texas Rules of Appellate Procedure 44.2. (Reversible Error in Criminal Cases) states:

> (a) Constitutional Error. If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

(b) Other Errors. Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

IV. Texas Penal Code

Texas Penal Code 42.07, Harassment, states:

(a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:

(1) initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene;

(2) threatens, in a manner reasonably likely to alarm the person receiving the threat, to inflict bodily injury on the person or to commit a felony against the person, a member of the person's family or household, or the person's property;

(3) conveys, in a manner reasonably likely to alarm the person receiving the report, a false report, which is known by the conveyor to be false, that another person has suffered death or serious bodily injury;

(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;

(5) makes a telephone call and intentionally fails to hang up or disengage the connection;

(6) knowingly permits a telephone under the person's control to be used by another to commit an offense under this section;

(7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another; or

(8) publishes on an Internet website, including a social media platform, repeated electronic communications in a manner reasonably likely to cause emotional distress, abuse, or torment to another person, unless the communications are made in connection with a matter of public concern.

(b) In this section:

(1) "Electronic communication" means a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system. The term includes:

(A) a communication initiated through the use of electronic mail, instant message, network call, a cellular or other type of telephone, a computer, a camera, text message, a social media platform or application, an Internet website, any other Internet-based communication tool, or facsimile machine; and

(B) a communication made to a pager.

(2) "Family" and "household" have the meaning assigned by Chapter 71, Family Code.

(3) "Obscene" means containing a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function.

(c) An offense under this section is a Class B misdemeanor, except that the offense is a Class A misdemeanor if:

(1) the actor has previously been convicted under this section; or

(2) the offense was committed under Subsection (a)(7) or (8) and:

(A) the offense was committed against a child under 18 years of age with the intent that the child:

(i) commit suicide; or

(ii) engage in conduct causing serious bodily injury to the child; or

(B) the actor has previously violated a temporary restraining order or injunction issued under Chapter 129A, Civil Practice and Remedies Code.

(d) In this section, "matter of public concern" has the meaning assigned by Section 27.001, Civil Practice and Remedies Code.

Texas Penal Code 42.072, Stalking, states:

(a) A person commits an offense if the person, on more than one occasion and pursuant to the same scheme or course of conduct that is directed

specifically at another person, knowingly engages in conduct that:

(1) constitutes an offense under Section 42.07 or that the actor knows or reasonably should know the other person will regard as threatening:

(A) bodily injury or death for the other person;

(B) bodily injury or death for a member of the other person's family or household or for an individual with whom the other person has a dating relationship; or

(C) that an offense will be committed against the other person's property;

(2) causes the other person, a member of the other person's family or household, or an individual with whom the other person has a dating relationship to be placed in fear of bodily injury or death or in fear that an offense will be committed against the other person's property, or to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended; and

(3) would cause a reasonable person to:

(A) fear bodily injury or death for himself or herself;

(B) fear bodily injury or death for a member of the person's family or household or for an individual with whom the person has a dating relationship;

(C) fear that an offense will be committed against the person's property; or

(D) feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended.

(b) An offense under this section is a felony of the third degree, except that the offense is a felony of the second degree if the actor has previously been convicted of an offense under this section or of an offense under any of the following laws that contains elements that are substantially similar to the elements of an offense under this section:

(1) the laws of another state;

(2) the laws of a federally recognized Indian tribe;

(3) the laws of a territory of the United States; or

(4) federal law.

(c) For purposes of this section, a trier of fact may find that different types of conduct described by Subsection (a), if engaged in on more than one occasion, constitute conduct that is engaged in pursuant to the same scheme or course of conduct.

(d) In this section:

(1) "Dating relationship," "family," "household," and "member of a household" have the meanings assigned by Chapter 71, Family Code.

(2) "Property" includes a pet, companion animal, or assistance animal, as defined by Section 121.002, Human Resources Code.

The 2011 version of Texas Penal Code 42.072, Stalking, states:

(a) A person commits an offense if the person, on more than one occasion and pursuant to the same scheme or course of conduct that is directed specifically at another person, knowingly engages in conduct that:

(1) The actors knows or reasonably believes the other person will regard as threatening:

(A) Bodily injury or death for the other person;

(B) Bodily injury or death for a member of the other person's family or household or for an individual with whom the other person has a dating relationship; or

(C) That an offense will be committed against the other person's property;

(2) Causes the other person, a member of the other person's family or household, or an individual with whom the other person has a dating relationship to be place in fear of bodily injury or death or fear than an offense will be committed against the other person's property; and

(3) Would cause a reasonable person to fear:

(A) Bodily injury or death for himself or herself;

(B) Bodily injury or death for a member of the person's family or household or for an individual with whom the person has a dating relationship; or

(C) That an offense will be committed against the person's property.

V. Federal Rule of Criminal Procedure

Federal Rule of Criminal Procedure 52(a) states:

Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

VI. Texas Code of Criminal Procedure

Texas Code of Criminal Procedure Article 7B.001 (Application for Protective Order) states:

(a) The following persons may file an application for a protective order under this subchapter without regard to the relationship between the applicant and the alleged offender:

(1) a person who is the victim of an offense under Section 20A.02, 20A.03, 21.02, 21.11, 22.011, 22.012, 22.021, 42.072, 43.05, Penal Code;

Effective in 2021

Texas Code of Criminal Procedure Article 7A.01 (Application for Protective Order) states:

(a) The following persons may file an application for a protective order under this chapter without regard to the relationship between the applicant and the alleged offender:

(1) a person who is the victim of an offense under Section 21.02, 21.11, 22.011, 22.021, or 42.072, Penal Code

Effective in 2013

Texas Code of Criminal Procedure Article 17.15 (Rules for Setting Bail) states:

(a) The amount of bail and any conditions of bail to be required in any case in which the defendant has been arrested are to be regulated by the court, judge, magistrate, or officer taking the bail in accordance with Articles 17.20, 17.21, and 17.22 and are governed by the Constitution and the following rules:

1. Bail and any conditions of bail shall be sufficient to give reasonable assurance that the undertaking will be complied with.

2. The power to require bail is not to be used to make bail an instrument of oppression.

VI(A). Indictments

Texas Code of Criminal Procedure 21.03 (What Should be Stated) states:

Everything should be stated in an indictment which is necessary to be proved.

Texas Code of Criminal Procedure 21.11 (Certainty; What Sufficient) states:

An indictment shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court, on conviction, to pronounce the proper judgment.

Texas Code of Criminal Procedure Article 21.19 (Defects of Form) states in relevant part:

An indictment shall not be held insufficient . . . by reason of any defect of form which does not prejudice the substantial rights of the defendant.

Texas Code of Criminal Procedure Article 27.08 (Exception to Substance of Indictment) states in relevant part:

There is no exception to the substance of an indictment or information except:

1. That it does not appear therefrom that an offense against the law was committed by the defendant;

VI(B). Article 46B: Incompetency To Stand Trial

Texas Code of Criminal Procedure Article 46B.0095 (Maximum Period of Commitment) states:

> (a) A defendant may not be committed to a mental hospital or other inpatient or residential facility or to a jail-based competency restoration program for a cumulative period that exceeds the maximum term provided by law for the offense for which the defendant was to be tried.

Texas Code of Criminal Procedure Article 46B.011 (Appeals) states:

> Neither the state nor the defendant is entitled to make an interlocutory appeal relating to a determination or ruling under Article 46B.005.

Texas Code of Criminal Procedure Article 46B.024 (Factors Considered in Competency Examination) states:

> During an examination under this subchapter and in any report based on that examination, an expert shall consider, in addition to other issues determined relevant by the expert, the following:
>
> (1) the capacity of the defendant during criminal proceedings to:
>
> (A) rationally understand the charges against the defendant and the potential consequences of the pending criminal proceedings;

(B) disclose to counsel pertinent facts, events, and states of mind;

(C) engage in a reasoned choice of legal strategies and options;

(D) understand the adversarial nature of criminal proceedings;

(E) exhibit appropriate courtroom behavior; and

(F) testify;

(2) as supported by current indications and the defendant's personal history, whether the defendant:

(A) is a person with mental illness; or

(B) is a person with an intellectual disability;

(3) whether the identified condition has lasted or is expected to last continuously for at least one year;

(4) the degree of impairment resulting from the mental illness or intellectual disability, if existent, and the specific impact on the defendant's capacity to engage with counsel in a reasonable and rational manner; and

(5) if the defendant is taking psychoactive or other medication:

(A) whether the medication is necessary to maintain the defendant's competency; and

> (B) the effect, if any, of the medication on the defendant's appearance, demeanor, or ability to participate in the proceedings.

Texas Code of Criminal Procedure 46B.073 (Commitment for Restoration to Competency) states:

> (a) This article applies only to a defendant not released on bail who is subject to an initial restoration period based on Article 46B.071.
>
> (b) For purposes of further examination and competency restoration services with the specific objective of the defendant attaining competency to stand trial, the court shall commit a defendant described by Subsection (a) to a mental health facility, residential care facility, or jail-based competency restoration program for the applicable period as follows:
>
> > (1) a period of not more than 60 days, if the defendant is charged with an offense punishable as a misdemeanor; or
> >
> > (2) a period of not more than 120 days, if the defendant is charged with an offense punishable as a felony.

Texas Code of Criminal Procedure Article 46B.080 (Extension of Order) states:

> (a) On a request of the head of a facility or a program provider that is made under Article 46B.079(d) and notwithstanding any other provision of this subchapter, the court may enter an order extending the initial restoration period for an additional period of 60 days.

(b) The court may enter an order under Subsection (a) only if the court determines that:

(1) the defendant has not attained competency; and

(2) an extension of the initial restoration period will likely enable the facility or program to restore the defendant to competency within the period of the extension.

(c) The court may grant only one 60-day extension under this article in connection with the specific offense with which the defendant is charged.

(d) An extension under this article begins on the later of:

(1) the date the court enters the order under Subsection (a); or

(2) the date competency restoration services actually begin pursuant to the order entered under Subsection (a).

Texas Code of Criminal Procedure Article 46B.085 (Subsequent Extensions Prohibited) states:

(a) The court may order only one initial period of restoration and one extension under this subchapter in connection with the same offense.

(b) After an initial restoration period and an extension are ordered as described by Subsection (a), any subsequent court orders for treatment must be issued under Subchapter E or F.

Texas Code of Criminal Procedure Article 46B.086(e) (Court Ordered Medications) states:

> (e) The court may issue an order under this article if the court finds by clear and convincing evidence that:
>
> (1) the prescribed medication is medically appropriate, is in the best medical interest of the defendant, and does not present side effects that cause harm to the defendant that is greater than the medical benefit to the defendant;
>
> (2) the state has a clear and compelling interest in the defendant obtaining and maintaining competency to stand trial;
>
> (3) no other less invasive means of obtaining and maintaining the defendant's competency exists; and
>
> (4) the prescribed medication will not unduly prejudice the defendant's rights or use of defensive theories at trial.

Texas Code of Criminal Procedure SubChapter E (Civil Commitment: Charges Pending), Article 46B.101 (Applicability) states:

> This subchapter applies to a defendant against whom a court is required to proceed according to Article 46B.084(3) or according to the court's appropriate determination under Article 46B.071.

The 2017 version of Texas Code of Criminal Procedure Article 46B.091(g) (Jail Based Competency Restoration by County) states:

(g) A psychiatrist or psychologist for the provider shall conduct at least two full psychiatric or psychological evaluations of the defendant during the period the defendant receives competency restoration services in the jail. The psychiatrist or psychologist must conduct one evaluation not later than the 21st day and one evaluation not later than the 55th day after the date the defendant is committed to the program. The psychiatrist or psychologist shall submit to the court a report concerning each evaluation required under this subsection.

APPENDIX I

The State of Texas vs. NEIL PAUL NOBLE
DOB: [redacted] Sex: Male Race: White

SID No. TX04840753 GJ Witness: Q. RASCO
AIS No. <#CID#>

C	Offense	LD	Statute	Agency
1	– STALKING	F3	PC 42.072(b)	TX0572000

TRN	TRS	NCIC Code
		13160014

INDICTMENT NO.: F1845998

(Filed Nov. 13, 2018)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

The Grand Jury of Dallas County, State of Texas, duly organized at the July Term, A.D., 2018 of the 195th Judicial District Court for said County, upon its oath do present in and to said Court at said term,

That **NEIL PAUL NOBLE**, hereinafter called Defendant, **on or about and between the 16th day of October, 2018 and the 5th day of November, 2018** in the County of Dallas, State of Texas, did did then and there on more than one occasion and pursuant to the same scheme or course of conduct that was directed specifically at another person, namely Messina Madson,

hereinafter called the Complainant, knowingly engage in conduct, namely:

- the Defendant, with intent to harass, annoy, alarm, abuse, torment, or embarrass the Complainant, sent repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, and offend the Complainant; and

- the Defendant, with intent to harass, annoy, alarm, abuse, torment, or embarrass the Complainant, initiated communication and in the course of the communication made a comment, request, suggestion, or proposal that was obscene;

and this conduct was conduct that:

- constituted an offense under Section 42.07, Penal Code, and that the Defendant knew or reasonably should have known the Complainant would regard as threatening bodily injury or death for the Complainant; and

- caused the Complainant:

    - to be placed in fear of bodily injury or death; and

    - to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended; and

- would cause a reasonable person to:

    - fear bodily injury or death for himself or herself; and

    - feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended.

APPENDIX J

REPORTER'S RECORD
VOLUME 2 OF 9 VOLUMES
TRIAL COURT CAUSE NO. F18-45998-K
COURT OF APPEALS NO. 05-21-00326-CR

STATE OF TEXAS	) CRIMINAL DISTRICT COURT
VS.	) NO. 4 OF
NEIL PAUL NOBLE	) DALLAS COUNTY, TEXAS

*****

VOIR DIRE/TRIAL ON MERITS

*****

On the 12th day of December, 2018, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Dominique Collins, Judge presiding, held in Dallas, Dallas County, Texas;

Proceedings reported by machine shorthand.

* * *

[121] So we'll start with the Mega Millions first. I did notice that there are a few people up in the jury from South Carolina. The winning ticket from recent lottery came from a small town in South Carolina, a convenience store type thing. I think there's a Wikipedia page for that town, and there are professional football players in that town. I think the last names were Meredith and Wharton. I gave a news tip to Meredith about suggesting how to invest the winning profits

from the lottery. I suggested a very diversified investment portfolio, a wide variety of stocks, real estate bonds, municipal bonds.

And you compare that to what happened with the Dallas pension system, where they put a lot of money into a limited type of investment, specifically commercial real estate. And then when we had the financial crash, they had too much money and the investment performed very poorly. And then the police lost a lot of their pension and put the city finances in peril. So I suggested a much more diversified portfolio rather than putting all your eggs in one basket and hoping that basket does well.

Unfortunately, we've had a lot of financial crashes in history. We can probably – most of us remember the recent one in 2008 that was tied to residential loans. Then we had one in 2001 that was tied to – it was the called dotcom bubble. They had some back in 1873. It was the called panic [122] of 1873, when President Grant was in office. There was one in 1893 when President Cleveland was in office. We had the Great Depression back in –

THE COURT: Hang on a second. I'm going to have to ask you to get your client back on the issues that relate to competency. I don't mean any harm, but we got to get back to that particular issue.

THE WITNESS: Okay. I brought up the diversified investment portfolio thing because we've had a lot of financial crashes. That's kind of more my professional background, my investments.

MS. MCKIMMEY: Your Honor, the State would like to stipulate to his quantitative analysis abilities.

THE COURT: Okay.

Q. (BY MS. GRINTER) Excellent. So, Mr. Noble, before I pass the witness, this is probably your last chance to put your position in front. You do not want to be found incompetent to stand trial; is that correct?

A. No, I do not want to be found incompetent to stand trial. I probably share some of the perspectives we heard in voir dire today, that sometimes they're just trying to push pills on people. I feel that's kind of what they're trying to do to me. It's delaying the proceedings and maybe trying to put pressure on a plea bargain.

I've had several interactions with the criminal [123] justice system and the mental health system. I go in and out. I don't stay very long. They didn't really come up with too much damage that I caused. Maybe I asked a girl out on a date that they don't want me to ask out. Or maybe I say something they might see as a threat, but they didn't really come up with anything. I just don't feel it really rises to the level that warrants six months of inpatient treatment with little expected benefit.

Q. And you understand that that means that you'll be weighed on the merits of this case and prosecuted on this case, depending on the State's ability to bring evidence against you?

A. Yes. And my understanding for a stalking charge is there needs to be a threat involving harm. And I didn't hear a threat of bodily harm from anybody today. So I don't think I would be guilty of the stalking charge. Maybe there's a less serious charge of harassment. This may be a little broad and less serious than stalking, but I didn't hear a credible threat of physical harm to Ms. Madson. If she has one, she can show it. If not, I kind of don't they they can carry their burden of proof.

MS. GRINTER: Okay. Pass the pass the witness.

MS. MCKIMMEY: No questions.

THE COURT: Okay. Let's take a two-second break.

THE COURT: Mr. Neil, you can stay seated.

* * *

[130] keeps tipping. And all we've got on this side is his testimony on quantitative analysis and the song lyrics that Randy Cohen is speaking to him from, to give advice on his legal case.

The decision is yours. Please look at all the evidence. Remember the testimony you've heard. Everything that was offered into evidence will be provided to you in the jury room. You can go through it and you can read the e-mails. You can see his state of mind and decide for yourself. And that's exactly what I'm going to ask you to do today. Thank you

THE COURT: All right.

THE BAILIFF: All rise.

(Jury deliberating, 4:37 - 5:16)

(Open court, defendant present, no jury)

THE DEFENDANT: Can I file for motion for speedy trial orally?

THE COURT: No. We have to wait.

THE BAILIFF: All rise.

(Open court, defendant and jury present)

VERDICT

THE COURT: All right. You may be seated.

All right. Ladies and gentlemen, thank you for your thoughtful consideration. I've received your verdict. It reads as follows: We, the jury, find by a preponderance of the evidence, the defendant is incompetent to stand trial at this

* * *

APPENDIX K

REPORTER'S RECORD
VOLUME 6 OF 9 VOLUMES
TRIAL COURT CAUSE NO. F–1845998–K
APPELLATE COURT CAUSE NO. 05–21–00326–CR

THE STATE OF TEXAS	) IN THE DISTRICT COURT
VS.	) DALLAS COUNTY, TEXAS
NEIL NOBLE	) CRIMINAL DISTRICT COURT NO. 4

VOIR DIRE

On the 26th day of April, 2021, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Dominique Collins, Judge Presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by computerized stenotype machine.

* * *

[5] **PROCEEDINGS**

(In open court, defendant present with his attorney.)

THE COURT: Just for the record, this is Cause No. F18-45998, styled the State of Texas versus Neil Noble. All right. So we've got the State

represented by Mr. McDonald and Mr. Varney, and then the defense for our citizen accused, we have Alison Grinter.

So we've got – we've done all of our pretrial motions, now we've got one last one we're going to entertain – and what's that motion? Well, a couple of more. I'm sorry. Go ahead.

MS. GRINTER: Judge, we would ask that the Court consider all of the written motions on file. Specifically, we would like to discuss the motion to quash and a motion to dismiss for speedy trial rights as well as a couple of extra limine issues.

The motion to quash, as I'm sure the Court is aware, is about the vagueness of the language of the stalking statute, "harass, annoy, alarm." These words are overreaching, overbroad, and can definitely bring in innocent conduct. And because it is an overbroad statute, it leaves it open [6] to arbitrary and capricious enforcement, which we believe is what happened here today.

THE COURT: State?

MS. GRINTER: Oh, I'm sorry, Judge, and we also wanted to add that it is an unconstitutional prior restraint on speech and in opposition to the defendant's first amendment right.

THE COURT: Okay. State?

MR. MCDONALD: Your Honor, the State's position is that the indictment in this case sufficiently

tracks the stalking statute and the harassment statute to allege sufficient intent as is associated with harassment, annoyance, alarm, abuse or torment, as well as an allegation that the defendant communicated information or a proposal that was obscene. Because of the specificity in this indictment, it's the State's position that the defendant is on sufficient notice of the conduct of which he is accused and that the speech in this case is not speech that falls under a prior restraint protection of the first amendment.

THE COURT: Okay. All right. Hearing arguments of both counsel, I will deny that motion as well as the motion to quash.

MS. GRINTER: That was the motion to [7] quash.

THE COURT: I'm sorry, the speedy trial one and the – and –

MS. GRINTER: We have some arguments to make about speedy trial.

THE COURT: Okay. Go ahead.

MS. GRINTER: Judge, we would ask that the court consider the Barker v. Wingo factors. The reason for this – obviously today is April of 2021. This is an offense alleged to have occurred in 2018. That is a nearly three-year delay.

The delay in this case is not the fault of the defendant. It has been in many ways added to by the global pandemic, however, there's also a considerable

delay because of competency proceedings. And for the purposes of this hearing we object to that delay and those competency proceedings as not founded.

The length of the delay – so we've got the length of the delay, the reason for the delay –

THE DEFENDANT: I asserted my rights.

MS. GRINTER: Oh, and Mr. Noble asserted his rights very, very early on. So that should – and continue to assert his rights against [8] even the competency proceedings.

THE DEFENDANT: [Unintelligible.]

MS. GRINTER: I've got that part. Hold on, please.

The prejudice is pretty obvious because he has spent a considerable amount of time incarcerated. Incarceration is prejudice per se and so we would offer that all four of the factors weigh in Mr. Noble's favor and this case should be dismissed.

THE COURT: Anything?

MR. MCDONALD: Your Honor, it's the State's position that the defendant has not met the Barker v. Wingo elements to show prejudice of his rights to a speedy trial.

The length of the delay, the reason for the delay, the assertion of the right and prejudice to the defendant as the court's aware are the factors to be considered. In this case no conduct on the part of the State

contributed to the delay. The 46(b) issues that have been with us, think is the way I will put it, through this proceeding are not things that have been caused by conduct of the State.

Moreover, the reason for the delay, [9] including the delay because of this pandemic, in which this would be the first jury trial in over a year in Dallas County, are not things that the State has contributed to in any form or fashion.

When you're looking at the Wingo factors, you're looking at whether or not to penalize the State for conduct that it contributed to. And in this case I do not believe that the defendant has met a showing sufficient to cause the indictment in this case to be dismissed for violation of the defendant's right to a speedy trial.

MS. GRINTER: Judge, if we could just briefly rebut. The State did contribute to the delay because of competency proceedings. Because in each case the State was the proponent of my client's incarceration and institutionalization for competency reasons and defense pushed back on that each time wanting only to go to trial on the merits of the case.

MR. MCDONALD: And, Your Honor, if I could just briefly respond and I won't take too much of your time. Once a party raises the issue or potential issue of competency in a case, the Court ultimately – it's the Court's decision on how to proceed. And I think that given the procedural [10] posture of this case, it

would not be fair to the State's interest to find that we contributed to violating his rights to a speedy trial.

THE COURT: Okay. I will deny that motion as well.

MS. GRINTER: Okay. Judge, we have some evidentiary issues that I'd like to get into very briefly.

THE COURT: What I don't want to do though is until – until we – after we pick the jury. Is it something that we have to do before we pick a jury?

MS. GRINTER: No.

THE COURT: Okay. So we'll – after we get the jury seated and let them go for the day and give them instructions, then we'll finish these hearings, okay?

MS. GRINTER: Okay.

(Off the record.)

MR. VARNEY: Do you have a specific -I never tried a case in your court. Do you have a specific way to do this?

THE COURT: No, pretty easy.

MR. VARNEY: In Cause No. F18-45998, styled the State of Texas versus Neil Paul Noble, in

* * *

APPENDIX L

[SEAL] **CAUSE NO. F-1845998-K** COUNT NO.
INCIDENT NO./TRN: 9064102341

THE STATE OF TEXAS	§	**IN THE**
v.	§	**CRIMINAL DISTRICT**
NEIL NOBLE	§ §	COURT #4
STATE ID NO.: TX04840753	§	DALLAS COUNTY, TEXAS

JUDGMENT OF CONVICTION BY COURT—
WAIVER OF JURY TRIAL

Judge Presiding: **Dominique Collins**	Date Sentence Imposed: **5/3/2021**
Attorney for State: **GARY MCDONALD**	Attorney for Defendant: **ALISON GRINTER #24043476**

Offense for which Defendant Convicted:
STALKING

Charging Instrument: **INDICTMENT**	Statute for Offense: **42.072 Penal Code**
Date of Offense: **11/5/2018**	Pleas to Offense: **GUILTY**
Degree of Offense: **3RD DEGREE FELONY**	Findings on Deadly Weapon: **N/A**

Terms of Plea Bargain (if any): or ☐ Terms of Plea Bargain are attached and incorporated herein by this reference.
10 YEARS TDC 4 YEARS PROBATED NO FINE

1st Enhancement Paragraph: **N/A**	Finding on 1st Enhancement Paragraph: **N/A**
2nd Enhancement Paragraph: **N/A**	Finding on 2nd Enhancement Paragraph: **N/A**

☒ SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR **4 YEARS**.
(The document setting for the conditions of community supervision is incorporated herein by this reference.)

Punishment and Place of Confinement: **10 YEARS TDCJ, CORRECTIONAL INSTITUTIONS DIVISION**

DATE SENTENCE COMMENCES: (Date does not apply to confinement served as a condition of community supervision.) **05/03/2021**	THIS SENTENCE SHALL RUN: **CONCURRENTLY**

Fine:	Court Costs:	Restitution:	Restitution Payable to:
$	$ **290**	$	See special finding or order of restitution which is incorporated herein by this reference.)

☐ **Defendant is required to register as sex offender** in accordance with Chapter 62, Tex. Code Crim. Proc.

(For sex offender registration purposes only) The age of the victim at the time of the offense was N/A.

Total Jail Time Credit: If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.
N/A DAYS **NOTES: N/A**

Was the victim impact statement returned to the attorney representing the State? **N/A**

(FOR STATE JAIL FELONY OFFENSES ONLY) Is Defendant presumptively entitled to diligent participation credit in accordance with article 42A.559, Tex. Code Crim. Proc.? **N/A**

This cause was called and the parties appeared. The State appeared by her District Attorney as named above.

Counsel / Waiver of Counsel (select one)

☒ Defendant appeared with Counsel.

☐ Defendant appeared without counsel and knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

☐ Defendant was tried in absentia.

Both parties announced ready for trial. Defendant waived the right of trial by jury and entered the plea indicated above. It appeared to the Court that Defendant was mentally competent to stand trial, made the plea freely and voluntarily, and was aware of the consequences of the plea. The Court received the plea and entered it of record. After hearing the evidence submitted, if any. the Court **ADJUDGES** Defendant **GUILTY** of the offense indicated above. The Court **FINDS** that the Presentence Investigation, if so ordered, was done according to the applicable provisions of Subchapter F, Chapter 42A, Tex. Code Crim. Proc.

Having been convicted of the offense designated above, the Court **ORDERS** Defendant punished in accordance with the Court's findings as to the proper punishment as indicated above. After having conducted an inquiry into Defendant's ability to pay, the Court **ORDERS** Defendant to pay the fine, court costs, and restitution as indicated above.

Punishment Options (select one)

☒ **Confinement in State Jail or Institutional Division.** The Court **ORDERS** the authorized agent of the State of Texas or the County Sheriff to take and deliver Defendant to the Director of the Correctional Institutions Division, TDCJ, for placement in confinement in accordance with this judgment. The Court **ORDERS** Defendant remanded to the custody of the County Sheriff until the Sheriff can obey the directions in this paragraph. Upon release from confinement, the Court **ORDERS** Defendant to proceed without unnecessary delay to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or to make arrangements to pay any fine, court costs, and restitution due.

☐ **County Jail—Confinement / Confinement in Lieu of Payment.** The Court **ORDERS** Defendant committed to the custody of the County Sheriff immediately or on the date the sentence commences. Defendant shall be confined in the county jail for the period indicated above. Upon release from confinement, the Court **ORDERS** Defendant to proceed without unnecessary delay to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or to make arrangements to pay any fine, court costs, and restitution due.

☐ **County Jail—State Jail Felony Conviction.** Pursuant to §12.44(a), Tex. Penal Code, the Court **FINDS** that the ends of justice are best served by imposing confinement permissible as punishment for a Class A misdemeanor instead of a state jail felony. Accordingly, Defendant will serve punishment in the county jail as indicated above. The Court **ORDERS** Defendant

committed to the custody of the County Sheriff immediately or on the date the sentence commences. Upon release from confinement, the Court **ORDERS** Defendant to proceed without unnecessary delay to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or to make arrangements to pay any fine, court costs, and restitution due.

☐ **Fine Only Payment.** The punishment assessed against Defendant is for a **FINE ONLY**. The Court **ORDERS** Defendant to proceed immediately to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or to make arrangements to pay the fine, court costs, and restitution ordered by the Court in this cause.

☐ **Confinement as a Condition of Community Supervision.** The Court **ORDERS** Defendant confine days in as a condition of community supervision. The period of confinement as a condition of community supervision starts when Defendant arrives at the designated facility, absent a special order to the contrary.

Execution of Sentence

☒ The Court **ORDERS** Defendant's sentence **EXECUTED**. The Court **FINDS** that Defendant is entitled to the jail time credit indicated above. The attorney for the state, attorney for the defendant, the County Sheriff, and any other person having or who had custody of Defendant shall assist the clerk, or person responsible for completing this judgment, in calculating Defendant's credit for time served. All supporting documentation, if any,

concerning Defendant's credit for time served is incorporated herein by this reference.

Furthermore, the following special findings or orders apply:

Date Judgment Entered:

/s/ *X* Dominique Collins
DOMINIQUE COLLINS,
JUDGE PRESIDING

Clerk: T.L.Cooper

Thumbprint *

*Certificate of Thumbprint attached.

APPENDIX M

No. 05-21-00326-CR

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

NEIL PAUL NOBLE,
APPELLANT

v.

THE STATE OF TEXAS,
APPELLEE

On appeal from Criminal District Court No. 4
of Dallas County, Texas
Cause No. F18-45998-K

BRIEF FOR APPELLEE,
THE STATE OF TEXAS

(Filed Apr. 22, 2022)

Counsel of Record:

JOHN CREUZOT
Criminal District Attorney
Dallas County, Texas

RICARDO VELA, JR.
Assistant District Attorney
State Bar No. 24072800
Frank Crowley Courts Building
133 N. Riverfront Blvd., LB-19
Dallas, Texas 75207-4399
(214) 653-3625 (*Phone*)
(214) 653-3643 (*Fax*)
ricardo.vela@dallascounty.org

The State does not request oral argument.

* * *

APPLICATION OF LAW TO FACTS

Length of Delay

The first *Barker* factor, the length of the delay, is measured from the time the defendant is arrested or formally accused. *United States v. Marion*, 404 U.S. 307, 313 (1971); *Dragoo*, 96 S.W.3d at 313. The length of the delay is, to some extent, a triggering mechanism, so that a speedy trial claim will not even be heard until passage of time that is, on its face, unreasonable in the circumstances. *Doggett v. United States*, 505 U.S. 647, 651-52 (1992); *Barker*, 407 U.S. at 530. If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. *Doggett*, 505 U.S. at 652; *Dragoo*, 96 S.W.3d at 314.

Here, the record shows that Appellant was arrested and formally arraigned for the charged offense

of stalking on November 7, 2018, and his jury trial in this case commenced two-and-half years later on April 26, 2021. (CR: 9-12, 15; RR6: 1). The State agrees with Appellant that this length of delay—considering only the date of arrest and the date of commencement of trial—is sufficiently lengthy to trigger a speedy trial analysis under *Barker*. *See Zamorano v. State*, 84 S.W.3d 643, 649 n.26 (Tex. Crim. App. 2002) (noting that Texas courts have generally held that a delay of eight months or more is "presumptively prejudicial" and will trigger a speedy trial analysis).

* * *

APPENDIX N

DALLAS COUNTY CRIMINAL DISTRICT COURT

State of Texas	)	Request to Set a Hearing Date for a Barker Inquiry [Speedy Trial Analysis]
v.	)	
Neil Noble	)	Case No. F18-45998
	)	(Filed Jun. 25, 2021)
	)	

Defendant Noble requests that the Court set a hearing date in February, 2021 for a Barker Inquiry [Speedy Trial Analysis]. See *Barker v. Wingo*, 407 U.S. 514, 1972. Noble filed a Motion to Dismiss for Denial of the Right to a Speedy Trial in December, 2020. The length of delay in bringing Noble to trial is now 27 months (since November 5, 2018).

> Previous decisions do not preclude the states from allowing an incompetent defendant to raise certain defenses such as insufficiency of the indictment or make certain pretrial motions. Jackson may have sound defenses that could sustain dismissal or acquittal that might now be asserted (at 740-741). (*Jackson v. Indiana*, 406 U.S. 715, 1972).
>
> In general, delay approaching one year is sufficient to trigger a speedy trial inquiry, *Doggett v. United States*, 505 U.S. at 652, Footnotes (at 889) (*Shaw v. State*, 117 S.W.3d 883, Tex. Cr. App., 2003).
>
> The government may not justify delay merely by citing the defendant's incompetence. *Jackson v.*

Indiana, 406 U.S. 715, 1972 (at 588) (*United States v. Geelan*, 520 F.2d 585 (9th Cir. 1975).

Noble has a Due Process Right to a Barker Inquiry hearing under the Sixth and Fourteenth Amendments to the United States Constitution.

February 2, 2021
Date

Neil Noble
Neil Noble, Inmate No. 20039045
West 5, P13-Dallas County Jail
P.O. Box 660334; Dallas, TX 75266-0334

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3 FEB 2021

Neil Noble
No. 20039045
West 5, P13
P.O. Box 660334
Dallas, TX 75266-0334

Felicia Pitre
Dallas County District Clerk
Frank Crowley Courts Bldg.
133 N. Riverfront Blvd., LB-12
Dallas, TX 75207-4313

APPENDIX O

Dallas County Criminal District Court No. 4

State of Texas	)	Motion to Quash Indictment
v.	)	[Indictment Insufficient]
Neil Noble	)	Case No. F18-45998

Notice of Motion and Motion to Quash Indictment

(Filed Mar. 26, 2021)

Defendant Noble Excepts to the Indictment, both in Form and in Substance, and moves the Court to Quash the Indictment on the ground that the Indictment is insufficient (6th Amendment U.S. Constitution; Art. 1, Sec. 10, Texas Constitution; TCCP 27.08(1), 27.09(2), 21.02(7)). The indictment does not include a statement of facts showing that an offense against the law under 42.072 was committed by Noble (See TCCP 27.08(1)). The indictment also does not include sufficient information to inform Noble of the precise nature and cause of the accusation in order to prepare a defense and to plead jeopardy in a future prosecution. Noble requests that the indictment be amended with the requested information. Including additional information in the indictment can also help the Court determine reasonable bail based on the seriousness of the charges. If the prosecution is either unable or unwilling to amend the indictment, Noble requests the case be dismissed and Noble's bond be exonerated. The Motion is scheduled to be heard at 10:00 a.m. on Monday,

March 22, 2021 at 10:00 a.m. in Dallas County Criminal District Court No. 4 (Judge Dominique Collins).

> The intent of the Constitution is that the accused be given information to prepare his defense. (Baker v. State, 58 S.W.2d 534) (at 851). [. . .] An indictment must allege on its face the facts necessary: 1) to show that the offense was committed; 2) to bar a subsequent prosecution for the same offense; and 3) to give defendant notice of precisely what he is charged with. Sassano v. State, 291 S.W.2d 323 (at 852). (Terry v. State, 471 S.W.2d 848, Tex.Cr.App., 1971).
>
> Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of facts and circumstances as will inform the accused of the specific offense coming under the general descriptions with which he is charged. United States v. Hess, 124 U.S. 483, 487, other citations omitted (at 765). (Russell v. United States, 369 U.S. 749, 1962)
>
> **Our prior cases have indicated that there are Constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error** (at 23) (Chapman v. California, 386 U.S. 18, Argued December 6-7, 1966, **Decided February 20, 1967**)

Noble wants the indictment amended to specify the following information that forms the basis of the case that the prosecution plans to use at trial:

> 1) Whether the prosecution is alleging a violation of 42.07 OR a threat under 42.072(a)(1) (there

is more than one manner or means in this subsection);

2) Whether the prosecution is alleging Noble described OR solicited an ultimate sex act under 42.07(b)(3) (there is more than one manner or means in this subsection);

3) Which of the seven manner or means in 42.07 Noble is accused of violating (42.07(a)(1) thru (a)(7)). (Drumm v. State, 560 S.W.2d 944, Tex.Cr.App., November 2, 1977);

4) Which of the seven words in the harassment statute, 42.07, the prosecution is alleging Noble violated (annoy, alarm, offend, embarrass, harass, abuse, or torment). The punishment could vary depending on the seriousness of the violation, tormenting should be more serious than annoying.; (Drumm, supra)

5) The basis for the allegations that Noble acted with intent to harass or threaten the alleged victim (is it because she is a former prosecutor?)

6) the total number of emails that Noble allegedly sent the victim with the intent to harass or threaten during the time period stated in the indictment, October 16, 2018 through November 5, 2018.

7) the date, time, and precise words Noble allegedly used in all emails that form the basis of the prosecution's case (See Lewis v. State, 88 S.W.3d 383, Court of Appeals, Fort Worth, 2002);

8) the date, time, and precise words Noble allegedly used in all emails that form the basis of the

prosecution's case that Noble threatened the victim or her family with bodily injury or death or property damage;

9) the date, time, and precise words Noble allegedly used in all emails that form the basis of the prosecution's case that Noble's comments were obscene;

10) the precise date, time and nature of any other acts or omissions by Noble that form the basis of the prosecution's case;

11) all facts and circumstances that form the basis of the prosecution's case that Noble intended to harass or threaten the victim ("The offense of stalking includes both an objective component and elements from the points of view of the accused and the complainant". (at 907). (Allen v. State, 218 S.W.3d 905, Beaumont, 2007); and

12) any and all times Noble was asked to stop contacting the alleged victim (date, time, and manner or means of communication.

Currently, there are three standards under which the sufficiency of an criminal indictment in Texas can be evaluated. See Article 1, Section 10 of the Texas Constitution and the Sixth Amendment to the United States Constitution: 1) general pleading rules under Texas Law, 2) pleading requirements in the face of a Motion to Quash under Texas Law, and 3) pleading requirements under United States Supreme Court rulings interpreting the notice requirement of the Sixth Amendment to the U.S. Constitution. The indictment in this case is insufficient under all three standards.

In all criminal prosecutions, the accused has a right to know the nature and cause of the accusation. The Sixth Amendment to the U.S. Constitution gives the accused the right to be informed of the nature and cause of the accusation. Article 1, Section 10 of the Texas Constitution gives the accused the right to demand the nature and cause of the accusation against him.

Both Federal and Texas case law have interpreted these Constitutional provisions to require the defendant be provided with a Statement of Facts and circumstances in the face of the indictment so the defendant can prepare his defense and plead jeopardy in a future prosecution. Texas case law has said that the indictment must also include facts sufficient to show that an offense against the law was committed by the defendant. For Federal case law see: 1) Russell v. Unites States, 369 U.S. 749, 1963; 2) United States v. Hess, 124 U.S. 483, 1888; and 3) United States v. Carll, 105 U.S. 611, 1881 or 1882. For Texas Case law see: 1) Garcia v. State, 981 S.W.2d 683, Tex.Cr.App., 1998; 2) Terry v. State, 471 S.W.2d 848, Tex.Cr.App., 1971; 3) Baker v. State, 58 S.W.2d 534, Tex.Cr.App., 1933.

Including a statement of facts in the indictment enables the accused to identity any false statements or accusations that are not true earlier in the process.

> And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case (at 404) (Pointer v. Texas, 380 U.S. 400, 1965).

> From the time of their arraignment until the beginning of their trial, when consultation and thorough investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense. He had not been given the opportunity to prepare the case (at 57-58). A defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense (at 59). (Powell v. Alabama, 287 U.S. 45, 1932).

Under Texas law, when the statute provides for more than one statutory manner or means of committing an offense, the accused has a right to know the precise section or subsection of the statute he is accused of violating. We have also said that "a statute which uses an undefined term of indeterminate or variable meaning requires more specific pleading in order to notify the defendant of the nature of the charges against him. (Mays v. State, 967 S.W.2d 404, Tex.Cr.App., 1998) (at 820). The State need not plead evidentiary matters. Curry v. State, 30 S.W.3d 394, 398, TCA, 2000 (at 819-820). (Ross v. State, 573 S.W.2d 817, Tex.Cr.App. 2019.)

An offense under the Harassment Statute, 42.07, could also constitute an offense under the stalking statute, 42.072. The Harassment statute contains eight undefined terms of variable or indeterminate meaning (annoy, alarm, offend, embarrass, harass, abuse, torment, and solicitation). The Harassment Statute also contains seven different manner or means of violating the statute (42.07(a)(1) thru (a)(7)).

A legal standard has developed in some offenses where specific additional information is required in the indictment beyond the words of the statute, including the precise statements allegedly made by the accused. The Texas Stalking and Harassment statutes, 42.072 and 42.07, are specific statutes where additional information beyond the words of the statute should be included in the indictment, including the date, time, and precise words allegedly used by the accused and any other acts or omissions of the accused that form the basis of the prosecution's case.

> In addition to the allegation involving the telephone message left on Reed's answering machine, the indictment alleges: (1) on November 23, 1999, Appellant knocked on Charles' bedroom window, and she looked outside to see him standing on the sidewalk about ten or fifteen feet from her apartment, (2) on June 25, 2000, Appellant left a telephone message for Charles stating, "You're gonna be done, bitch. You're gonna be done"; (3) on July 4, 2000, Appellant left a telephone message for Charles stating, "You fucked up my life, now you have got to be part of it until I die"; (4) on July 4, 2000, Appellant left a phone message saying he would "make things even with [Charles]" and made a reference to "an eye for an eye and a tooth fora tooth"; and (5) on July 6, 2000, Appellant followed Charles in a car. (at 389). (Lewis v. State, 88 S.W.3d 383, Court of Appeals, Fort Worth, 2002).
>
> The evidence at trial focused on six voicemail messages that Wilson left on Bailey's phone over a period of ten months. The jury heard testimony from Bailey regarding various interactions between the

> two during that time period (at 420). (Wilson v State, 448 S.W.3d 418, Tex.Cr.App. September 17, 2014)
>
> The plaintiff must prove what in the criminal law is known as "specific intent", an intent which goes beyond the mere intent to do the act. By far the greatest part of the fabulous record in this case was concerned with proving intent [intent to monopolize] (at 432) (United States v. Aluminum Co. of America, 148 F.2d 416 (5th Cir. March 12, 1945)).

Other stalking or harassment cases case with additional information included in the charging document are:

> 1) Long v. State, 931 S.W.2d 285, Tex.Cr.App. 1996 (The information charged that appellant committed three acts constituting the conduct of stalking: (1) seizing the complainant's head or neck with appellant's arm, (2) seizing the complainant's arm with appellant's hand, and (3) parking appellant's car outside of the complainant's residence. These acts were alleged to have occurred on September 30, 1993, February 15, 1994, and March 29, 1994 respectively. Footnote #2).
>
> 2) Ploeger v. State, 189 S.W.3d 799, Hous 1st, 2006 (sent victim mail and gifts, followed victim. Additional evidence was presented at trial).
>
> 3) Pomier v. State, 326 S.W. 373, Hous 14th, 2010 (date telephoned victim and threatened harm, sat outside victim's house in motor vehicle, burglarized house)

Other types of cases where an indictment has been found to be defective on appeal for not including the precise statements of the accused that form the basis of the prosecution's case are:

1) Amaya v. State, 551 S.W.2d 385, Tex.Cr.App., 1977 (The information makes no attempt to set out the specific "willfully false statement" the appellant is alleged to have made. The appellant was required to make many statements to the Department of Public Welfare, she was entitled, upon proper exception, to know which false statement or statements the State would rely upon for conviction. (at 387).

2) Garrett v. State, 68 S.W.2d 507, Tex.Cr.App, February 14, 1934 (There are not averments setting out what the representations were which are claimed to have been false - similar to swindling. The false or deceitful pretense or device, or fraudulent representation used to accomplish the swindle, must be set forth fully and accurately. The complaint and information charge no offense because of the omissions indicated. In view of the undisputed evidence, we are at a loss to understand why the trial judge ever permitted the case to go to the jury or how the jury could have reached a guilty verdict. Judgment reversed.)

3) Hamp Lagrone v. State, 12 Tex.App. 426, Court of Appeals of Texas, 1882 (We conclude an indictment of information under Art, 645 bad unless it sets out, at least substantially, the language or writing constituting the imputation of the want of chastity. We think defendant is entitled to be informed in the charge of the particular slander

> which he is called upon the answer, that he may prepare his defense. He is allowed under the statute to justify, by proving the truth of the imputation. How can he come to trial prepared to avail himself of this defense, unless he has been informed of the particular imputation charged against him).
>
> 4) Dixon v. State, 1 S.W. 448, Court of Appeals of Texas, 1886 (The accused party may have sold intoxicating liquors to a thousand different persons, without in a single instance, having violated the law. How is he to know which particular sale he is to answer for unless the indictment in some way identifies the sale complained of. Must he come prepared to prove the legality of each of the thousand sales he made. To require this would be unreasonable and oppressive. Because the indictment is defective in a manner of substance, the indictment is dismissed).

Under Texas case law, a written instrument or written document must be set out in the indictment if it forms the basis of the prosecution's case or if its construction has a bearing on the innocence or guilt of the defendant. Therefore, Noble should be entitled to have the precise emails alleged set out in the indictment. The Rudy case involved an anonymous letter, Rudy v. State, 195 S.W. 187, 1917.

> In Leinart, 262 S.W.2d 504, this Court held that the indictment was sufficient to charge the offense of swindling, but it found that since such written instruments were the fraudulent representations, they were inadmissible into evidence because they were not set out in haec verba in the indictment.

> Thus, in swindling cases, where the false representation is based on a written instrument, that written instrument must be set out in the indictment. The rule requiring that the written instrument be set out in haec verba has been applied by this Court to forgery cases, Harris v. State, 199 S. W.2d 522; Thomas v. State, 18 Tex.App. 213; Smith v. State, 18 Tex.App. 399; **to sending an anonymous letter**, Rudy v. State, 195 S.W. 187, to false swearing, Ziegler v. State, 50 S.W.2d 317, and to "untrue advertising." Pincus v. State, 70 S.W.2d 417. There appears to be one Texas case where the rule has been applied to the offense of counterfeiting. Martin v. State, 18 Tex.App. 224 (1885). (at 849-850). (Terry v. State, 471 S.W.2d 848, Tex.Cr.App., 1917).
>
> The plain inference of the indictment, from the words used in the indictment, is that the newspaper contained a "printed or written composition" that was indecent or obscene. The composition or print should have been set out, or such description given of it, as that the court could judge of its character. (State v. Hansen, 23 Tex. 232, Supreme Court of Texas, 1859).

The Sixth Amendment right to notice of the nature and cause of the accusation is a fundamental Constitutional Right and is applicable to proceedings in State Courts through the 14th Amendment to the U.S. Constitution.

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense-a right to his day in court-are basic in our system of jurisprudence; and these rights include,

as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel (at 273). (In re Oliver, 333 U.S. 257, 1948).

No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. In re Oliver, 333 U.S. 257, and cases there cited. (at 201). (Cole v. Arkansas, 333 U.S. 196, 1948).

The Sixth Amendment, which has been made applicable to the States by the Fourteenth Amendment, provides specified standards for all criminal prosecutions (at 27). In Re Oliver, we held the right to public trial was applicable to a State proceeding, 333 U.S. at 272. Another guarantee is the right to be informed of the nature and cause of the accusation. Still another, the right of confrontation. Pointer v. Texas, 380 U.S. 400. And another, compulsory process for obtaining witnesses in one's favor. Washington v. Texas, 388 U.S. 14. We have never limited these rights to felonies or to lesser but serious offenses (at 27-28). (Argersinger v. Hamlin, 407 U.S. 25, 1972).

The rights to notice, confrontation, and compulsory process, when taken together, guarantee that criminal charge may be answered in a manner now considered fundamental to the fair administration of American Justice (at 818) (Faretta v. California, 422 U.S. 806, 1975)

There are several other Federal Constitutional Rights included in the Bill of Rights (primarily in the First Eight Amendments to the U.S. Constitution) that U.S. Supreme Court has declared to be fundamental rights in the American system of Jurisprudence and made applicable to proceedings in State Courts through Due Process Clause of the Fourteenth Amendment to the United States Constitution.

1) Fifth Amendment right to due process of law includes an impartial trial judge. (Tumey v. Ohio, 273 U.S. 510, 1927, Chief Justice Taft writing the opinion);

2) Sixth Amendment right to a public trial. (In re Oliver, 333 U.S. 257, 1948);

3) The Fourth Amendment's exclusionary rule. (Mapp v. Ohio, 367 U.S. 643, 1961);

4) Sixth Amendment right to counsel Gideon v. Wainright, 372 U.S. 335, 1963 (6th Amendment right of indigent defendant to counsel is a fundamental right applicable to the State's through the 14th amendment. Defendant conducted defense as well as can be expected. He made an opening statement, cross-examined witnesses, presented a witness in his defense, declined to testify himself and made a short argument emphasizing his innocence).; Johnson v. Zerbst, 304 U.S. 458, 1938 (6th amendment right to counsel is a fundamental right of life and liberty. Barrier to arbitrary or unjust deprivation of human rights. Determination of whether there has been an intelligence waiver of the right to counsel depends on the facts and circumstances of the particular case, including the

background, experience, and conduct of the accused).

5) Fifth Amendment right to freedom from self-incrimination. (Malloy v. Hogan, 378 U.S. 1, 1964);

6) Sixth Amendment Right to confront witnesses. (Pointer v. Texas, 380 U.S. 400, 1965);

7) Sixth Amendment right to a speedy trial. (Klopfer v. North Carolina, 386 U.S. 213, 1967);

8) Sixth Amendment right to compulsory process for obtaining witnesses. (Washington v. Texas, 388 U.S. 14, 1967);

9) Sixth Amendment right to a jury trial. (Duncan v. Louisiana, 391 U.S. 145, 1968); and

10) Fifth Amendment double jeopardy clause. (Benton v. Maryland, 395 U.S. 784, 1969);

The Double Jeopardy Clause of the Fifth Amendment prohibits a person from twice being put in jeopardy for the same offense. If a person is found not guilty, he cannot be put on trial again for the same charges. Double Jeopardy also prohibits a person from being punished twice for the same act. Three United States Supreme Court rulings on Double Jeopardy are:

1) Blockburger v. United States, 284 U.S. 299, 1933;

2) Grady v. Corbin, 495 U.S. 508, 1990;

3) United States v. Dixon, 509 U.S. 688, 1993

Sixth Amendment to the United States Constitution: Rights of Accused in Criminal Prosecutions:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and **to be informed of the nature and cause of the accusation**; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Article 1, Section 10 of the Texas Constitution: Rights of Accused in Criminal Proceeding:

> In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. **He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof.** He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in

> the army or navy, or in the militia, when in actual service in time of war or public danger.

After the 1985 changes to the Texas Constitution and the Texas Code of Criminal Procedure, amendments to an indictment can be made without going back in front of a grand jury (Studer v. State, 799 S.W.2d 299, Tex.Cr.App. 1990).

A defendant can appeal the denial of a Motion to Quash pretrial (Ross v. State, 573 S.W.3d 817, 2019).

No matter what the evidence was against him, he had the right to have an impartial judge. He seasonably raised the objection and was entitled to halt the trial because of the disqualification of the judge, which existed both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village. (Tumey v. Ohio, 273 U.S. 510, 1927, Chief Justice Taft writing the opinion);

The Motion is also based on the accompanying Memorandum of Points and Authorities, including exhibits:

> "In all criminal prosecutions, the accused shall have [. . .] the right of being heard by himself or counsel, or **both**, . . . (Article 1, Section 10 of the Texas Constitution)
>
> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the

accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. (at 819-820) (Faretta v. California, 422 U.S. 806, 1975).

Neil Noble
11138 Joymeadow Dr.
Dallas, TX 75218
Cell Phone: (214) 707-0722
Email: neil.noble@sbcglobal.net

Date

* * *

APPENDIX P

Dallas County Criminal District Court No. 4

State of Texas	)	Motion to Quash Indictment
v.	)	[Stalking Statute Unconstitutional]
Neil Noble	)	
	)	Case No. F18-45998

Notice of Motion and Motion to Quash Indictment

(Filed Mar. 26, 2021)

Defendant Noble Excepts to the Indictment and moves the Court to Quash the Indictment on the ground that the current version of the Stalking Statute, Penal Code Section, 42.072, is Unconstitutional. The Motion is scheduled to be heard at 10:00 a.m. on Monday, March 22, 2021 at 10:00 a.m. in Dallas County Criminal District Court No. 4 (Judge Dominique Collins).

The current version of the Stalking Statute, Penal Code Section 42.072, is both unconstitutionally overbroad and vague on its face and as applied to Noble. The incorporation of the harassment statute by reference, 42.07, outlaws too much speech that is constitutionally protected under First Amendment to the U.S. Constitution, chilling free speech, and is therefore unconstitutionally overbroad in violation of the First and Fourteenth Amendments to the U.S. Constitution. This discourages Noble from ever asking women out on dates and discussing public safety issues such as Islamic Extremist terrorism. The words "annoy" and

"alarm" are also unconstitutionally vague under the "void for vagueness doctrine" in the First Amendment context in that they allow law enforcement to apply the law in an arbitrary, capricious, and discriminatory manner, using it selectively against certain individuals, in violation of the Fifth and Fourteenths Amendment to the U.S. Constitution. The competency prosecutor, Kendall McKimmey, stated in open court in front of a jury in December, 2018 that there was not a threat. (Coates v. Cincinnati, 402 U.S. 611, 1971, Grayned v. City of Rockford, 408 U.S. 104, 1972, Kramer v. Price, 712 F.2d 714 (5th. 1983); 716 F.2d 284 (5th. 1983), and 723 F.2d 1164 (5th. 1984); State v. May, 765 S.W.2d 438, 1989, Tex.Cr.App., 1989 (endorsing Kramer); (Long v. State, 931 S.W.2d 285, Tex.Cr.App., 1996).

The Harassment Statute, 42.07, is incorporated by reference into the stalking statute, 42.072, and a harassment violation can alone be sufficient to support a stalking conviction without a threat. Two Texas Court of Appeals have found the harassment statute, 42.07, to be unconstitutional recently. If the harassment Statute is found unconstitutional, the current version of the stalking statute must be held to be unconstitutional as well. The Fort Worth of Appeals relied primarily on the "void for vagueness" argument in Long. The Houston 14th Court declined to apply the ruling in Scott, 322 S.W. 2d 662, TCA, 2010 that ruled that 42.07(a)(4) (repeated telephone communications) is not unconstitutionally overbroad to 42.07(a)(7) (electronic communications). In Wilson, the Court of

Criminal Appeals itself declined to follow its own ruling in Scott on the definition of "repeated", questioning the reliance on a legal text on the issue of Legislative intent, 448 S.W.3d. 418, Sept. 17, 2014. The Two Court of Appeals rulings are: 1) **Fort Worth**: Ex Parte Barton, 586 S.W.3d 573, Fort Worth 2nd, October 3, 2019, citing Karenev v. State, 258 S.W. 210, Fort Worth 2nd, 2008, reversed on other grounds Karenev v. State, 281 S.W.3d 428, Tex.Cr.App., 2009 and 2) **Houston**: State v. Chen, No.14-19-00372-CR, 14-19-00373-CR, Houston 14th, December 31, 2020 and Ex Parte Ordonez, No. 14-19-01005-CR, Houston 14th, January 26, 2021.

The term "soliciting" in the definition of obscenity in the harassment statute, 42.07(b)(3), is unconstitutionally overbroad and vague, thus 42.07(a)(1) unconstitutional.

Other relevant cases Noble found on the kiosk in jail are 1) State v. Edmonds, 933 S.W.2d 120, 126, Tex.Cr.App., 1996 (citing May that the harassment statute was unconstitutionally vague because it failed to define adequately the words "annoy" and "alarm", and gave police officers, prosecutors and triers of fact unfettered discretion to apply the law, creating a danger of arbitrary and discriminatory enforcement. Edmonds evaluated the constitutionality of the word "mistreatment") and 2) Ex Parte Lo, 424 S.W.3d 10, Tex.Cr.App. 2013 (an online solicitation of a minor statute was found unconstitutionally overbroad, 33.021(b)).

The incorporation of the harassment statute into the stalking statute in the 2013 amendment allows the same behavior to be punished as a either a Class B Misdemeanor (punishable by 0 to 180 days in jail) or a Third Degree Felony (punishable by 2 to 10 years in jail), rendering the statutory scheme either inoperable or unconstitutional in violation of the 8th Amendment to the U.S. Constitution (unusually severe punishment). See Furman v. Georgia, 408 U.S. 238, 1972; Robinson v. California, 370 U.S. 660, 1962; and Lousiana ex rel Francis v. Resweber, 329 U.S. 459, 1947. In Long, the Court said "the only difference between the lesser and greater offense in this example is that the greater offense contains an additional predicate act involving protected activity. Surely, the Legislature may not be permitted to create such greater offenses whose only distinguishing charateristic - and hence sole justification for imposing greater punishment consists of solely activity protected by the First Amendment" (at 294). In Stevens v. State, 167 S.W.2d 1027, Tex.Cr.App., 1943 (Holding there is a conflict in the penalties prescribed by Article 697, 698, and 699; consequently, the Judgment is reversed and the prosecution ordered dismissed).

Noble also argues that the 2013 Amendment to stalking statute requires the case to be prosecuted as an misdemeanor harassment case under the in pan materia doctrine. The in pari materia doctrine is a principle of statutory construction. It is a rule courts may use in determining the intent of the Legislature in enacting a particular statute or statutes. It applies

if the two statutes have the same purpose or object where on statute deals with the subject in a more detailed way. The two statutes should be harmonized if possible, but if there is any conflict, the latter will prevail. See Burke v. State, 28 S.W. 3d 545, 546, Tex.Cr.App., 2000 quoting Mills v. State, 722 S.W.2d 411, 413, Tex.Cr.App., 1986 (State v. Vasilas, 253 S.W.3d 268, Tex.Cr.App. 2008). The in pari materia doctrine was found to be inapplicable to prior versions of the stalking and harassment statutes in Segura v. State, 826 S.W.2d 178, Dallas, 1992).

The stalking charge would be dismissed. The Prosecution can appeal. The full name of the Prosecutor in criminal portion of the case appears to be **Gary Coates McDonald, Jr.**, which is evidence of "bad faith" on the part of the prosecution since the controlling case is still Coates v. Cincinnati, 402 U.S. 611, 1971, ruling the word "annoy" unconstitutionally vague in the First Amendment context (right of assembly). Coates is still good law (see Chicago v. Morales, 527 U.S. 41, 1999 and Johnson v. United States, 576 U.S. 591, 2015).

The Motion is also based on the accompanying Memorandum of Points and Authorities, including exhibits:

> "In all criminal prosecutions, the accused shall have [. . .] the right of being heard by himself or counsel, or both, . . . (Article 1, Section 10 of the Texas Constitution)

* * *

IV. The Word "Solicitation" is Unconstitutionally Vague, 42.07(b)(3)

The core violation of the obscenity provision of the harassment statute is the description of an ultimate sex act, see 42.07(a)(1) and (b)(3). That definition comes from the U.S. Supreme Court ruling in Miller v. California, 413 U.S. 15, 1973.

However, the statutory definition of obscenity contains another provision: "soliciting an ultimate sex act", see 42.07(b)(3). Noble argues that the term "soliciting" is unconstitutionally overbroad and vague. Does it require an offer of payment? Does the act sought have to be illegal, such as sex with a person under 17? Or does merely asking a person to have sex violate the statute even if an ultimate sex act is not described?

> 42.07(b)(3): "Obscene" means containing a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function.
>
> Both appellant and the State argue that the disposition of appellant's claim turns on the meaning of the word "patently" as used in § 42.07(b). "Patently" is not specifically defined in § 42.07 and therefore has not acquired a particular or technical meaning. When a statutory term has not acquired a technical meaning, the term should be read in context and construed according to rules of grammar and common usage. See Tex. Gov't Code Ann.§ 311.011(a) and (b) (Vernon 1988); Pettijohn

> v. State. 782 S.W.2d 866, 868 (Tex.Crim.App.1989). (at 896) (Salisbury v. State, 867 S.W.2d 894,Hous, December 16, 1993).

Noble found two United States Supreme Court rulings involving a definition of the word "solicitation":

> Solicitation of prostitution - offered to perform sexual acts in exchange for money. (Arcara v. Cloud Books, 478 U.S. 697, 1986)
>
> The pandering and solicitation made unlawful by the Act are the sort of inchoate crimes - acts looking toward the commission of another crime (the delivery of child pornography (at 300). (U.S. v. Williams, 553 U.S. 285, 2008).

* * *

Neil Noble
11138 Joymeadow Dr.
Dallas, TX 75218
Cell Phone: (214) 707-0722
Email: neil.noble@sbcglobal.net

Date

* * *

APPENDIX Q

Dallas County Criminal District Court No. 4

State of Texas	)	Motion to Dismiss For Denial Of Right to Speedy Trial
v.	)	
Neil Noble	)	Case No. F18-45998
	)	(Filed Mar. 26, 2021)

Defendant Noble moves the Court to Dismiss the case on the ground that Noble has been denied his right to a speedy trial (Barker v. Wingo, 407 U.S. 514, 1972, Doggett v. United States, 505 U.S. 647, 1992). Noble was incarcerated continuously for over 28 months (854 days), from November 5, 2018 until March 9, 2021, due to the competency to stand trial proceedings, which is an unreasonably long time, even for competency proceedings (Hull v. State, 699 S.W.2d 220, Tex.Cr.App, 1985 (8 month competency delay is not unreasonable). Noble suffered extreme prejudice due to the effects of the lengthy incarceration and the anxiety over the criminal charges. At this time, Noble does not seek dismissal on the ground of impairment of defense. The docket shows that Noble asserted his right to a speedy trial in writing three times (2/19/2019, 11/12/2019, and 10/13/2020), which is sufficient, but Noble actually asserted it more frequently. Noble was not eligible for bail but did request bail in writing three times (1/15/2019, 3/31/2020, and 12/4/20). Criminal defendants have a federal constitutional right to a speedy trial under the Sixth Amendment which is applicable to proceedings in State Courts through the Fourteenth

Amendment (Klopfer v. North Carolina, 386 U.S. 213, 1967; Hull, 699 S.W.2d at 221). Article 1, Section 10 of the Texas Constitution also provides for the right to a speedy trial (Hull, at 221).

> Resolution of this case is preferable to the continued public scorn and disruption to which a defendant can be subjected (at 224). Conviction reversed. (Hull v. State, 699 S.W.2d 220, Tex.Cr.App., 1985)
>
> It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time. The prompt disposition of criminal cases is to be commended and encouraged. (at 59 ((Powell v. Alabama, 287 U.S. 45, 1932).

I. Reasons For The Delay

When Noble returned from a mental hospital in October, 2019, a trial date was set for February, 2020. Instead of holding trial, Judge Collins held another competency hearing. Noble was incarcerated for 13 months due to that decision which wasted over a year of Noble's life.

* * *

APPENDIX R

Court of Appeals for the Fifth District of Texas

Neil Noble	)	Motion to Remove Ankle Monitor
v.	)	As Condition of Bail
State of Texas	)	Case No. 05-21-00326-CR
_____	)	(Filed Oct. 18, 2022)

Noble requests that the Court of Appeals remove the ankle monitor as a condition of Noble's bail. Wearing an ankle monitor is oppressive, unreasonable, an excessive use of force and violates Noble's liberty. Noble has gained 10 pounds in the last 6 months. Noble weighed 183 at a medical exam on October 14, 2022. Noble's blood pressure was 140 over 80. The ankle monitor constrains Noble's ability to exercise properly, running specifically. Noble was diagnosed with a thickened/enlarged heart due to high blood pressure on or about February or March, 2017. Noble was told by a cardiologist that he could have serious heart problems in the next 10 years if the condition continued.

> Our concern is not with the intent of the order but with its effect. We focus not on what the order constitutionally prevents, but on what it unconstitutionally constrains. The order plainly freezes Ferebee's legitimate rights. The protection order fulfilled its purpose. Incidents of direct contact between Ferebee and Hobart ceased. Hobart v. Ferebee, 692 N.W.2d 509, 516, Supreme Court of South Dakota, 2004.

> Electronic ankle monitors are bulky and difficult to conceal. The wearers are often presumed to be dangerous criminals. The stigma of wearing them could be intended as part of the punishment. (Source: "Ankle Monitors Could Stigmatize Wearers" by Melanie Lefkowitz, news.cornell.edu, June 17, 2020). (Tab 4)

Wearing an ankle monitor is not a condition that Noble will continue to comply with. Noble's physical health cannot continue to deteriorate. A bail condition is considered "oppressive" if the person would rather be in jail than comply. Cells areas in the Dallas County jail have stairs that can be used for running. See TCCP 17.15(a)(2) (The power to require bail is not to be used to make bail an instrument of oppression.)

> Stairway to Heaven is a 1971 song by Led Zeppelin. Lyrics include "sometimes words have two meanings" and "don't be alarmed now".

The safety of the community is a factor to consider in the bail determination. Noble cannot in good conscious continue to wear the ankle monitor due to any increased risk of foreign attack. What message does the way that Noble is being treated send to the rest of the world? While the Court is not pumping toxic air into Noble's residence, the Court is subjecting Noble to its affects through physical restraints. The United States complains about Russia's tactics in Ukraine and Syria's use of chemical weapons.

> "There's danger in the air" is a lyric from song Billy's Got a Gun by Def Leppard (released in 1983). Other lyrics from the song include "he's on

the run", "he's going underground to track", and "his innocence he suffered for",

The statute does not allow a policeman or his agent to use excessive force to effect an arrest. Ford v. State, 538 S.W.2d 633, 636, Tex.Cr.App., July 14, 1976.

* * *