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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL ISSUES

Noble responds to oral argument in *Counterman v. Colorado*, No. 22-138 on April 19, 2023. For example, Chief Justice Roberts cited a comment and asked in what way was that threatening (p.53). Justice Barrett asked in what slice of cases would threat of bodily harm not be present (p.44). Justice Kavanaugh asked for examples of cases where a person was prosecuted who should not have been (p.28) and about how prior convictions affected sentencing (p.76).

1873 Comstock Act was cited in *Alliance for Hippocratic Medicine v. FDA*, No. 23-10362, 5th Cir. April 12, 2023. Comstock Act also applies to obscene publications sent through the mail. 42.07(a)(1) has been applied to oral comments. See *Nuncio v. Texas*, No. 22-202, *Ex Parte Nuncio*, 579 S.W.3d 448, 452, Tex.App.4, 2019.

Noble had physical exam on April 21, 2023. blood pressure: 160 over 90; pulse: 52; Weight: 186. The diagnosis was "well-conditioned".

Noble saw a case on the web site where a reply brief was filed after a waiver of a brief in opposition. "I count" is the first lyric in the song *Nobody's Fool* by Cinderella from the *Night Songs* album, released August 2, 1986.

A. Argument

Meeting people online and establishing dating relationships electronically has become more common.

Multiple electronic communications have replaced one telephone call. Noble is single, never married, with no children.

A(1). Structural Error Review for Insufficient Notice

This Court did not rule on whether insufficient notice was structural error in *United States v. Resendiz-Ponce*, 549 U.S. 102, 2007. Sixth Amendment violations that pervade entire proceeding cast doubt on fairness of trial process and can never be considered harmless. *Satterwhite v. Texas*, 486 U.S. 249, 256, 1988. Deprivation of right to counsel of choice, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *Sullivan v. Louisiana*, 508 U.S. 275, 282, 1993. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 2006.

Amendment to indictment occurs when essential elements are broadened. Per se reversible error. *United States v. Keller*, 916 F.2d 628, 634 (11th Cir. November 2, 1990).

A(2). Texas Stalking Statute Unconstitutional

Noble seeks a mens rea requirement of intent or purpose to threaten bodily injury. If this court decides on knowledge, then Noble seeks knowledge victim fears bodily injury "knows" rather than "reasonably should know".

Comstock Act of 1873 prohibited mailing obscene publications. It targeted abortion, contraception, and pornography. Enacted due to proliferation of obscene materials in 1870s. State laws prohibited abortion and contraceptives[1].

1873 Comstock Act did not apply to private letters or oral comments. Congress added "letters" in 1888. Distinction made between sealed letters and magazines and pamphlets. *Public Clearing House v. Coyne*, 194 U.S. 497, 506-507, 1904. "if the Comstock Act is strictly understood" *Alliance for Hippocratic Medicine v. FDA*, No. 23-10362, p.41 (5th Cir. April 12, 2023).

Recent amendments to Texas Harassment Statute, 42.07, do not include annoy, alarm, embarrass, or offend. Noble lists terms used in each State's harassment statute. Noble lists states that have a "serves no legitimate purpose" element.

A(3). This Court Should Set Speedy Trial Precedent

This Courts precedents should be enforced by lower courts.

> Our holding makes clear [. . .] contrary to nine Courts of Appeals. *Elonis v. United States*, 575 U.S. 723, 2015.

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[1] Brandon R. Burnette, *The First Amendment Encyclopedia*, Middle Tennessee State University.

8 month competency delay did not infringe on right to speedy trial. *Hull v. State*, 699 S.W.2d 220, 222, Tex.Cr.App., 1985.

This Court has not articulated standards for authenticating electronic communications which is an issue included in a speedy trial review. Texas Rule of Evidence 901 is analogous to Federal Rule of Evidence 901.

A(4). Ankle Monitor Affects Liberty Interest

Conditions of release can impose a significant, extended restraint on liberty that is subject to judicial review for reasonable cause under Fourth Amendment. *Gerstein v. Pugh*, 420 U.S. 103, 114, 1975.

Protection order ceased direct contact. Our concern is with the effect, on what it unconstitutionally constrains. *Hobart v. Ferebee*, 692 N.W.2d 509, 515-516, S.D., 2004.

A(5). This Court Rules on First Amendment Protection

In First Amendment cases, this court must make independent determination whether material is constitutionally protected. *Jacobellis v. Ohio*, 378 U.S. 184, 190, 1964.

Florida Obscenity convictions reversed citing *Jacobellis*. *Grove Press v. Gerstein*, 378 U.S. 577, 1964; *Tralins v. Gerstein*, 378 U.S. 576, 1964.

Liberty protected by Due Process Clause includes rights to marry, to have children. (*Washington v. Glucksberg*, 521 U.S. 702, 719-720, 1997).

References to sex not per se obscene. *United States v. Keller*, 259 F.2d 54, 57-59, 3rd Cir. 1958.

B. Indictment

B(1). Notice is Fundamental Constitutional Right

Texas recognizes notice of the nature and cause of the accusation is a fundamental constitutional right. *Labelle v. State*, 720 S.W.2d 101, 107, Tex.Cr.App., 1986; *Fisher v. State*, 887 S.W.2d 49, 58, Tex.Cr.App., 1994.

B(2). More Precise Notice Required

Precise language and circumstances should be set out in indictment so Court can determine whether First Amendment applies. *State v. Drake*, 325 A.2d 52, 54-55, Maine, 1974.

When statute characterizes offense in general or generic terms, specific facts must be set out in indictment. *State v. Gainey*, 376 So.2d 1240, 1241-1242, La, 1979.

B(2)(a). Harassment and Stalking Cases from Other States

More specific pleading required than language of statute:

1: *State v. Wright*, 911 P.2d 166, Kan., 1996. (threat, stalking, harassment);

2: *People v. Yablov*, 706 N.Y.S.2d 591, N.Y. City Criminal Court, 2000) (harassment);

3: *Commonwealth v. Patrick*, 105 S.W. 981; Ky. App., 1907 (allegedly threatening letter sent to Maud Dixon. Ruled no offense committed).

B(2)(b). Obscenity

Courts have ruled that obscenity not required to be included due to the nature of the material. However, obscene material has been included in some indictments. Courts include obscene comments in opinions.

Two magazine articles set out verbatim in indictment. *Lockhart v. United States*, 250 F. 610, 611-612 (8th Cir. 1918), Indictment cites obscene language used. *Keller*, 259 F.2d at 56.

B(2)(c). Precise Statements Required

Precise statements alleged to be criminal violations were not properly plead:

1) *Amaya v. State*, 551 S.W.2d 385, 387, Tex.Cr.App., 1977 (welfare fraud);

2) *Garrett v. State*, 68 S.W.2d, 507, Tex.Cr.App., 1934 (fraudulent representations);

3) *Lagrone v. State*, 12 Tex.App. 426, 1882 (slander)

B(2)(d). Gambling

Gambling typically involves multiple transactions on different dates:

1) *Jeffers v. State*, 646 S.W.2d 185, Tex.Cr.App., 1981 (indictment included date, game, name of bettor. Means of placing bet not specified).

2) *Sassano v. State*, 291 S.W.2d 323, Tex.Cr.App., 1956 (dates and times of bookmaking acts)

3) *Conklin v. State, 162 S.W.2d 973, Tex.Cr.App., 1942* (Indictment insufficient for not naming or describing gaming device. Term "device" has no definite meaning)

B(2)(e). Notice of Specific Acts Committed

Without more precise notice, accused would require to come prepared to defend against numerous acts.

1) *Swabado v. State*, 597 S.W.2d 361, Tex.Cr.App., 1980 (tampering with government record)

2) *Atkins v. State*, 667 S.W.2d 540, Tex.App., Dallas, 1983 (stealing trade secrets)

3) *Dixon v. State*, 1 S.W. 448, Tex.App., 1886 (selling intoxicating liquors. Must he come prepared to prove legality of each of the thousand sales he made).

B(3). Statement of Facts Case Law

With motion to quash, indictment must allege facts necessary to show offense committed. Notice examined from perspective of accused in light of constitutional presumption of innocence. *DeVaughn v. State*, 749 S.W.2d 62, 67-68, Tex.Cr.App., 1988.

Indictment must specify the facts which must be proved. Article 1, Section 10, Constitution of Texas. *Baker v. State*, 58 S.W.2d 534, Tex.Cr.App., 1933, citing *Hewitt v. State*, 25 Tex. 722, 1860

Every fact or circumstance necessary to complete description of offense should be alleged. Constitutional test. *Labelle*, *supra*.

Circumstances which render act illegal must be disclosed. If any material fact or circumstance be omitted, indictment will be bad. *State v. Duke*, 42 Tex. 455, 459-460, 1874.

B(4). Variance

Admitting letter not a variance. Quoted phrases set out in information. *Fischer v. State*, 361 S.W.2d 395, 397, Tex.Cr.App., 1962

Testimony about swindle inadmissible. Written instrument used in swindle should have been set out in indictment. *Wilson v. State*, 193 S.W. 669, 670, Tex.Cr.App., 1917.

C. Constitutionality of Texas Stalking and Harassment Statutes

C(1). 42.07(a)(1) Unconstitutional

42.07(a)(1) is unconstitutional based on historical analogues. It is also vague and overbroad, both on its face and as applied to Noble.

Mailing obscene letter not an offense under Act of July 12, 1876. *United States v. Chase*, 135 U.S. 255, 1890. Act of September 26, 1888 applies to private sealed letters. *United States v. Andrews*, 162 U.S. 420, 423, 1896.

Letter from man to unmarried woman proposing overnight trip, expenses paid plus five dollars, was obscene. *United States v. Martin*, 50 F. 918, 919, W.D. Virginia, 1892. Letters for purposes of seduction or immoral meetings without obscenity not prohibited. *United States v. Lamkin*, 73 F. 459, E.D. Va. 1896.

(C)(2). Recent Amendments to 42.07 and 42.072 Don't Include Annoy, Alarm, Embarrass, or Offend

Online harassment provision added in 2021, 42.07(a)(8) (in a manner reasonably likely to cause emotional distress, abuse, or torment. Exception for matters of public concern). Governor Abbott vetoed 2019 version of 42.07(a)(8) on First Amendment grounds.

2023 H.B. 1427 prohibits obscene, intimidating, or threatening communications from temporary or disposable phone number, 42.07(a)(9). 2023 S.B. 1717 adds terrified or intimidated to terms in stalking statute, 42.072((a)(2) and 42.072(a)(3)(d).

C(3). Knows or Reasonably Should Know Standard

The "reasonably should know" provision of 42.072(a)(1) is unconstitutionally vague and overbroad, both on its face and as applied to Noble.

Federal statutes have a mens rea requirement:

Harassment: 47 U.S.C. 223 (knowingly for obscenity, intent for telephone communication)

Cyberstalking: 18 U.S.C. 2261A (intent)

C(3)(a). Intent Or Knowledge Mens Rea Required

Ancient requirement of culpable state of mind for a crime. Intent is an inherent element of a common law offense against the person. A reckless or negligent standard could be applied to accidents. *Morrissette v. United States*, 342 U.S. 246, 250-255, 1952.

The significant fact is the intent and purpose. *Coyne*, 194 U.S. at 516.

A State may ban cross burning carried out with intent to intimidate (347-348). Virginia Supreme Court held it overbroad because possibility of prosecution chills expression of protected speech (351). *Virginia v. Black*, 538 U.S. 343, 2001.

We generally interpret criminal statutes to include scienter requirements. Mental state requirement satisfied if defendant transmits communication for purpose of issuing threat, or with knowledge communication will be viewed as threat. *Elonis, supra.*

C(3)(b). Unconstitutionally Vague

Lower standards make it too easy for police to arrest people. If someone does not approve of a dating relationship, a person could be arrested even if criminal charges aren't justified.

A "heckler's veto" refers to people in the audience objecting to what is said, interfering with the right to free speech. *Reno v. ACLU*, 521 U.S. 844, 880, 1997.

Suppression of speech by police is an old device outlawed by our Constitution. *Watts v. United States*, 394 U.S. 705, 712, 1969.

More important aspect of vagueness doctrine are guidelines to govern law enforcement to guard against arbitrary deprivation of liberty. (*Kolendar v. Lawson*, 461 U.S. 352, 358, 1983).

C(3)(c). Risk of Criminal Prosecution Chills Protected Speech

The more severe the criminal penalty, the more likely constitutionally protected activity will be "chilled" or "discouraged". *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244, 2002 (facial challenge permitted to statutes with severe penalties); *Reno v. ACLU*, 521 U.S 844, 872, 1997 (criminal sanctions and risk of discriminatory enforcement pose First Amendment concerns).

Texas stalking conviction can be enhanced to First Degree felony with two prior convictions (5 to 99 years). Noble successfully completed probation so Noble's priors cannot be used (2 to 10 years). See *Ex Parte Pue*, 552 S.W.3d 226, Tex.Cr.App., 2018 (conviction not final for enhancement purposes if probation successfully completed); *Wahl v. State*, No. 02-20-00040-CR, 2022 WL 247434, App.2, 2022 (life sentence).

C(4). Examples of States Limiting to True Threats

California: *Orellana v. Barr*, 967 F.3d 927, 938 (9th Cir. 2020).

Massachusetts: *O'Brien v. Borowski*, 261 N.E. 2d 547, Mass., 2012.

Iowa: *State v. Button*, 622 N.W.2d 480, 485, Iowa, 2001.

Washington: *State v. Williams*, 26 P.3d 890, Wash. 2001.

C(5). Cases With Insufficient Evidence

1. Communications contained expressions of frustration about government: *United States v. Weiss*, 475 F. Supp.3d 1015, N.D. Cal, 2020; *State v. Dugan*, 303 P.3d 755, Montana, 2013; *State v. Fratzke*, 446 N.W.2d 781, Iowa, 1989;

2. Communications were attempt to initiate romantic relationship: *United States v. Infante*, 782 F. Supp. 2d 815, D. Ariz, 2019; *Schnitz v. State*, 475 N.E.2d 59, Ind.App.3, 1985.

3. Specific Intent Required: *United States v. Tobin*, 552 F.3d 29 (1sr Cir. 2009)

C(6). Mental Illness Defense Not Being Used

12 of 49 Texas stalking cases involved attempts to establish a romantic relationship. None used a

mental illness defense. 30 involved a prior romantic relationship. 7 had another type victim (neighbor, judge).

C(7). State Harassment Statutes

Statutes in 26 other states partially invalidated if annoy, alarm, embarrass, and offend are unconstitutional. Massachusetts and D.C. have "seriously alarms". Federal statute has "abuse, threaten, or harass". 47 U.S.C. 223(c).

C(7)(a). Number of States with Each Term

Abuse	6
Alarm	17
Seriously Alarms	7
Annoy	24
Seriously Annoy	1
Bother	1
Coerce	1
Disturb	1
Embarrass	1
Emotional Distress	5
Substantial Emotional Distress	3
Frighten	4
Harass	35
Humiliate	1
Intimidate	13

Molest	1
Offend	4
Terrify	7
Terrorize	4
Threaten	14
Torment	4

C(7)(b). Terms Used by State

Alabama: intent to harass, annoy, or alarm,(13A-11-8)

Alaska: intent to harass or annoy,(11.61.120)

Arizona: would cause reasonable person to be seriously alarmed, annoyed, humiliated or mentally distressed,(13-2921(E))

Arkansas: purpose to harass, annoy, or alarm,(5-71-208)

California(stalking): knowing and willful course of conduct that seriously alarms, annoys, torments, or terrorizes.(646.9(e).

Colorado: intent to harass, annoy, or alarm,(18-9-111)

Connecticut: intent to harass, terrorize, or alarm, (53a-183)

Delaware: intent to harass, annoy, or alarm,(1311)

Florida: course of conduct which causes substantial emotional distress,(748.048)

Georgia: purpose of harassing, molesting, threatening or intimidating,(16-11-39.1)

Hawaii: intent to harass, annoy, or alarm,(711-1106)

Idaho: intent annoy, terrify, threaten, intimidate, harass, or offend,(18-6710):

Illinois: threatening injury,(720 ILCS 5.26.5-(3)(a)(5))

Indiana: intent to harass, annoy, or alarm,(35-45-2-2)

Iowa: intent to intimidate, annoy, or alarm,(708.7)

Kansas: intent to abuse, threaten, or harass,(21-6206)

Kentucky: intent to intimidate, harass, annoy, or alarm (525.080)

Louisiana: in a manner reasonably expected to abuse, torment, harass, embarrass, or offend (Title 14,Sec.285(a)(2))

Maine: intent to harass, torment, or threaten, (17-A.506(A))

Maryland: intent to harass, annoy, or alarm,(3-803)

Massachusetts: knowing pattern of conduct that seriously alarms and would cause reasonable person substantial emotional distress,(Ch.265,Sect.43A)

Michigan(stalking): causes emotional distress, (750.411h)

Minnesota: Intent to intimidate or harass,(609.79)

Mississippi: purpose of terrifying, threatening, or harassing,(97-45-15)

Missouri: with the purpose to cause emotional distress,(565.090/565.091)

Montana: purpose to terrify, intimidate, threaten, harass, annoy or offend,(45-5-221)

Nebraska: knowing and willful course of conduct which seriously terrifies, threatens, or intimidates,(28-311.02)

Nevada: knowingly threatens bodily injury,(200.571)

New Hampshire: purpose to annoy, abuse, threaten, or alarm,(644:4)

New Jersey: purpose to harass; purpose to alarm or seriously annoy,(2C-33-4)

New Mexico: intended to annoy, seriously alarm or terrorize,(30-3A-2)

New York: intent to harass, annoy or alarm,(240.26)

North Carolina: knowing conduct that torments, terrorizes, or terrifies,(14-277.3A)

North Dakota: intent to frighten or harass,(12.1-17-07)

Ohio: purpose to harass, intimidate, or abuse; knowingly alarms,(2917.21(1)&(11))

Oklahoma: intent to terrify, intimidate, harass or threaten bodily injury,(21-1172)

Oregon: intentionally harass or annoys or subjects to alarm,(166.065)

Pennsylvania: intent to harass, annoy, or alarm, (2709)

Rhode Island: knowing and willful course of conduct that seriously alarms, annoys, or bothers,(11-52-4.2)

South Carolina: intentional, substantial, and unreasonable intrusion into private life that would cause reasonable person emotional distress,(16-3-1700(B))

South Dakota: knowing and willful course of conduct which seriously alarms, annoys, or harasses,(22-19A-4)

Tennessee: intent that frequency or means of communication annoys, offends, alarms, or frightens, (39-17-308(a)(2))

Utah: intent to intimidate, abuse, threaten, harass, frighten,(76-9-201)

Vermont: intent to terrify, intimidate, threaten, harass, or annoy,(13-19-1027)

Virginia: intent to coerce, intimidate or harass,(18.2-427)

Washington: knowingly threatens,(9A.46.020(1)(a))

West Virginia: intent to harass or abuse,(61-8-16)

Wisconsin: intent to harass or intimidate (947.013(1m))

Wyoming (stalking): knew or should have known would cause reasonable person substantial emotional distress,(6-2-506)

District of Columbia (stalking): intent to cause individual to feel seriously alarmed, disturbed, or frightened,(22-3133)

C(7)(c). States With No Legitimate Purpose Element

"No legitimate purpose" is an element in 23 states: Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Kentucky, Michigan, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, West Virginia, Wisconsin.

3 states have "without a lawful or legal purpose" (Maryland, Ohio, Tennessee). 2 states have "without reasonable or good cause" (Maine, Missouri)

D. Speedy Trial

D(1). Judge Collins Prejudiced First Competency Trial

Judge Dominique Collins ordered jury removed at December, 2018 competency trial after Noble cited case law on authentication of emails. Collins prejudiced jury against Noble's competence (RRVol2,73:17-74:3).

> Undue influence is influence or dominion which prevents person from exercising discretion. *Long v. Long*, 125 S.W.2d 1034, Tex. 1939

Collins wrong on law. Emails require authentication under 901(a).

> Must present sufficient evidence item is what proponent claims. (*United States v. Barnes*, 803 F.2d 209, 217-218 (5th Cir. 2015).
>
> person's email address, without more, typically not sufficient. *Tienda v. State*, 358 S.W.3d 633, 642, Tex.Cr.App., 2012.

E. Ankle Monitor

E(1). Length of Use Should Be Limited

6 months of 5 year community supervision. Aggravated assault on public servant *Hernandez v. State*, No. 01-12-00721-CR, Tex. App. 1, 2014.

2 years of 30 year supervised release. Child sex crime. *United States v. Russell*, 45 F.4th 436, D.C, 2022.

E(2). ACLU Report

Electronic monitoring "EM" is among most severe conditions of release. Devices cause immense harm (p.4). No statistically significant reduction in failures to appear in court or new crimes committed while on release (p.7). Decades of evidence make clear that over conditioning people leads to worse outcomes (p.10). The longer someone is subject to EM, the more likely they are to be thrown in jail due to alleged failures to comply (p.7). **Electronic monitoring has a negative effect on people with disabilities, including high blood pressure** (p.8)[2].

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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