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Collin County, Texas
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CAUSE NO. 001-87528-2024

THE STATE OF TEXAS	§	**IN COUNTY COURT**
	§	
V.	§	**AT LAW NUMBER 1**
	§	
RILEY DALTON MIX	§	**COLLIN COUNTY, TEXAS**

MOTION TO QUASH INFORMATION

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, RILEY DALTON MIX, "Accused," in the above-styled cause, and moves the court to quash the information in this cause. In support, shows the Court as follows:

The information in the cause, states:

> "In the Name and by Authority of the State of Texas.
>
> NOW COMES THE CRIMINAL DISTRICT ATTORNEY of Collin County, State of Texas, and presents in and to the County Court At Law 1 of Collin County, State aforesaid, that one Riley Dalton Mix hereinafter styled Defendant heretofore, on or about the 26th day of September, 2023 to the 8th day of October, 2023 in the County of Collin and State of Texas, did then and there
>
> with intent to harass, annoy, alarm, abuse, torment, or embarrass Eric July, hereafter styled the complainant, **intentionally, knowingly or recklessly threaten** the complainant in a manner reasonably likely to alarm the complainant, **to inflict bodily injury on the complainant,**
>
> with intent to harass, annoy, alarm, abuse, torment or embarrass Eric July, hereafter styled the complainant, send repeated electronic communications to the complainant **in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass or offend another,** ***namely by posting alarming, threatening and vulgar posts on social media,***
>
> Against the peace & dignity of the State." (emphasis added)

1. **This information charging the Accused with Harassment under Tex. Penal Code §42.07 is confusing and vague. The offense is not "set forth in plain and intelligible words," and it does not provide reasonable certainty that will give the defendant "notice of the particular offense with which he is charged," nor "enable the court, on conviction, to pronounce the proper judgment." TEX. CODE CRIM. PROC. Art. 21.21(7); TEX. CODE CRIM. PROC. Art. 21.11.**

A. The two paragraphs lack a conjunctive or disjunctive word or phrase between them.

The information appears to allege at least one count of Harassment under Tex. Penal Code §42.07. The paragraphs lack a conjunctive or disjunctive word or phrase between the two and are not otherwise separated into counts. Consequently, it is ambiguous whether the information: (1) charges two counts of harassment; (2) charges one count of harassment, but alleges two alternative manner and means of committing the offense; or (3) charges one count of harassment, where the first paragraph alleges the violation, and the second paragraph merely describes the manner and means by which the Accused threatened bodily injury.

The Accused's substantial rights are harmed by this lack of notice insofar as he is unaware what he is charged with, how many convictions are authorized by the information, whether he is able to sever the offenses if charged with more than one count of harassment, and which elements of harassment the State would need to prove at trial.

B. The first paragraph of the information includes the mental states "knowingly, or recklessly" when Harassment can only be committed with intent.

All means of committing the offense of Harassment require that a person acts "with intent." TEX. PENAL CODE. §42.07(a). The phrase "with intent" is synonymous to the culpable mental state of "intentionally." *See* TEX. PENAL CODE §6.03(a) ("A person acts intentionally, or with intent…").

The information here alleges that the Accused "with intent to harass, annoy, alarm, abuse, torment, or embarrass Eric July, hereafter styled the complainant, ***intentionally, knowingly or recklessly threaten***[ed] the complainant in a manner reasonably likely to alarm the complainant, to inflict bodily injury on the complainant." Based on most of the language in that paragraph of

the information, the Accused can only assume the State is attempting to allege an offense under Tex. Penal Code §42.07(a)(2). However, the clear language of the statute states that "[a] person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person threatens, in manner reasonably likely to alarm the person receiving the threat, to inflict bodily injury on the person…" TEX. PENAL CODE §42.07(a)(2). The statute does not include the extra culpable mental states which the State has alleged in the information in this case. In the closest reading of the information by the Accused, one can only assume the State alleges that the included culpable mental states relate to only the threat; however, if one were to look at various statutes in the Penal Code, the State would have still added culpable mental states not authorized by law. *See, e.g.*, TEX. PENAL CODE §22.01(a)(2) (ASSAULT) ("A person commits an offense if the person *intentionally or knowingly* threatens another with imminent bodily injury.") (emphasis added); TEX. PENAL CODE §22.07(a) (TERRORISTIC THREAT) ("A person commits an offense if he threatens to commit any offense involving violence to any person…*with intent* to place any person in dear of imminent serious bodily injury.") (emphasis added).

Moreover, the first paragraph alleging an offense does not indicate a specific manner and means by which the Accused supposedly committed an offense. The information simply states a general statement that a threat was made but does not indicate what the threat exactly entailed. The Accused cannot properly prepare a defense against the allegations if it is not clear on the face of the information of what he is accused.

The information either does not state a means by which the Defendant could commit the offense, or harms the defendant insofar as it alleges, and authorizes a conviction upon proof of two lesser mental states. This would deprive the Defendant of his due process rights to have each and every element of the offense proven beyond a reasonable doubt.

Alternatively, it does not appear from the information that an offense against the law was committed. *See* TEX. CODE CRIM. PROC. Art. 27.08(1)

C. The information alleges recklessness without specifying, with reasonable certainty, what acts or circumstances surrounding the conduct are relied upon to constitute that recklessness.

The Code of Criminal Procedure provides:

> "Whenever recklessness or criminal negligence ***enters into or is a part or element of any offense, or it is charged that the accused acted recklessly*** or with criminal negligence in the commission of an offense, the complaint, information, or indictment in order to be sufficient in any such case must allege, with reasonable certainty, the act or acts relied upon to constitute recklessness or criminal negligence, ***and in no event shall it be sufficient to allege merely that the accused, in committing the offense, acted recklessly*** or with criminal negligence." TEX. CODE CRIM. PROC. ART. 21.15 (emphasis added).

The information alleges merely that an offense was committed by: "intentionally, knowingly or recklessly threaten[ed] the complainant in a manner reasonably likely to alarm the complainant, to inflict bodily injury on the complainant." The information is plainly insufficient because it does not specify exactly what conduct constituted the threat of bodily injury, or how such a threat was made recklessly.

D. The first paragraph of the information fails to specify the manner and means of committing an offense. Defendant is entitled to additional notice as to how he allegedly threatened bodily injury.

The information alleges that the defendant threatened bodily injury to the complainant, but it does not specify what he did to do so. This is a failure of the information to "state everything which is necessary to be proved." Tex. Code Crim. Proc. art. 21.03; *See Cruise v. State*, 587 S.W.2d 403 (Tex. Crim. App. 1979).

In *Cruise v. State*, 587 S.W.2d 403 (Tex. Crim. App. 1979), the Court of Criminal Appeals reversed a conviction for the offense of robbery by because the indictment did not specify "the way in which he did so," i.e., how the defendant allegedly caused the bodily injury. *Id* at 404. The Court concluded that "the trial court committed reversible error in refusing to order the State to disclose such facts when confronted with appellant's motion to quash the indictment." *Id*. The Court should therefore quash the information.

2. In order to harmonize the entire Harassment statute, the manner and means of committing harassment by publishing electronic communications to a website or social media are limited to the elements described in 42.07(a)(8) rather than 42.07(a)(7). Alternatively, 42.07(a)(7) is unconstitutionally vague and overbroad.

The second paragraph of the information reads: "with intent to harass, annoy, alarm, abuse, torment or embarrass Eric July, hereafter styled the complainant, send repeated electronic communications to the complainant **in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass or offend another, *namely by posting alarming, threatening and vulgar posts on social media*,**" (emphasis added).

A. There is a clear legislative intent that Harassment committed by publishing on a website, including social media, have different actus reus requirements than 42.07(a)(7) and that those charged under the statute for doing so have a defense that the communications are "made in connection with a matter of public concern."

The information alleges a manner and means of violating Tex. Pen. Code § 42.07(a)(8) rather than violating Tex. Pen. Code § 42.07(a)(7) namely, "by posting alarming, threatening, and vulgar posts on social media." The legislature's enactment of 42.07(a)(8) expressed a legislative intent that publishing on social media have a more limited actus reus and have a specific defense that the posts be related to a matter of public concern. Bill Analysis, Tex. S.B. 530 87th Leg., R.S. (Tex. Senate. Research Ctr. 2021)(Now codified as TEX. PEN. CODE § 42.07(a)(8))(Effective September 1, 2021).

In the words of the act's sponsor, Texas Senator Joan Huffman:

> "While current law prohibits harassment if it is done by direct communication, such as a text message, or private message directly to a victim's social media account, it does not prohibit harassment posted openly on social media platforms such as YouTube or Facebook group pages or other similar platforms.
>
> Closing this gap in the harassment code is incredibly vital. While Texas has taken steps to try to get a grasp on cyberbullying and online harassment, any measures will remain incomplete while this omission is left open.
>
> **This would close the loophole by creating a criminal offense for harassment published on an Internet website that causes distress, abuse, or torment to another person. This offense rules out communications made in connection with a matter of public concern to make sure that there would be no chilling effect on political speech**." *Id* (emphasis added).

Texas Penal Code 42.07(a)(7) and 42.07(a)(8) compared:

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

(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**;" TEX. PEN. CODE. 42.07(a)(7)-(8) (emphasis added)

"When interpreting a statute, [courts] look not only at the single, discrete provision at issue but at the other provisions within the whole statutory scheme." *State v. Schunior*, 506 S.W.3d 29, 37 (Tex. Crim. App. 2016). Several factors may guide the court in construing whether a statute is ambiguous on its face, including "the object sought to be attained; circumstances under which the statute was enacted; legislative history; common law or former statutory provisions, including laws on the same or similar subjects; consequences of a particular construction; administrative construction of a statute; and title (caption), preamble, and emergency provision." TEX. GOV. CODE ANN. §311.023. When construing statutes, courts "seek to effectuate the collective intent or purpose of the legislators who enacted the legislation." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

It is clear that the legislature, in codifying 42.07(a)(8) intended to criminalize certain publishing on websites, like social media, with both a more culpable actus reus than 42.07(a)(7) (i.e that the repeated electronic communications published in a manner reasonably like to cause emotional distress, abuse, or torment, rather than communications sent in a manner reasonably like to harass, annoy, alarm, abuse, torment, embarrass, or offend another) and that those charged for violating the statute by publishing repeated electronic communications have available to them a specific statutory defense that "the communications are made in connection with a matter of public concern." *Id*.

The plain language of 42.07(a)(7) would otherwise subsume the entirety of any offense under 42.07(a)(8), rendering 42.07(a)(8) surplusage to the statute. This would not give full force and effect to the entirety of the statute and circumvent the legislature's intent to provide for a heightened burden, and a specific defense for electronic communications published on websites if those communications were made in connection with a matter of public concern.

Therefore, the information's manner and means alleging that the defendant committed an offense by "posting alarming, threatening and vulgar posts on social media," need be pleaded under an information that conforms to 42.07(a)(8). Otherwise, the defendant is denied his due process rights to have the state prove beyond a reasonable doubt every element of the charged offense, and his right to present a defense.

B. Alternatively to the above, 42.07(a)(7) is unconstitutionally overbroad and void for vagueness.

42.07(a)(7) is overbroad and void for vagueness in violation of the Defendant's constitutional rights to freedom of speech as guaranteed to him by the First, Fifth, and Fourteenth Amendments of the United States Constitution and Article 1, Section 8 of the Texas Constitution, for the reasons stated by the court in *State v. Chen*, 615 S.W.3d 376 (Tex. App.-Houston [14th] 2020 vacated and remanded); *But see State v. Chen*, Nos. 14-19-00372-CR, 14-19-00373-CR, 2023 Tex. App. LEXIS 6654 (Tex. App.—Houston [14th Dist.] Aug. 29, 2023, no pet.)(reversing after remand from *Chen v. Chen*, 665 S.W.3d 448 (Tex. Crim. App. 2022)).

As the Court of Criminal Appeals in *Chen v. Chen*, 665 S.W.3d 448 (*Citing* Acts 2017, 85th Leg., ch. 522 (S.B. 179), §§ 13, 14, eff. Sept. 1, 2017) made clear, *Ex parte Barton*, 662 S.W.3d 876 (Tex. Crim. App. 2022) and *Ex parte Sanders*, 663 S.W.3d 197 (Tex. Crim. App. 2022) upholded the constitutionality of the pre-2017 versions of 42.07(a). The newer version's expansion of the definition of what an electronic communication captures just about every conceivable communication on the web, not merely communications directly to a complainant. *See* TEX. PEN. CODE. 42.07(b)(1).

In this case the statute is overbroad and vague even to the Accused's conduct, as the information alleges that the Accused committed an offense by "by posting alarming, threatening, and vulgar posts on social media." The indeterminacy of the meanings of "vulgar" and "annoying" were reasons that previous version of the entire statute was unconstitutional on its face for vagueness. *Kramer v. Price*, 712 F.2d 174, 178 (5th Cir. 1983); *May v. State*, 765 S.W.2d 438 (Tex. Crim. App. 1989).

The information seeks to prescribe a criminal penalty in part due to the alleged posts' vulgarity, and that it would reasonably likely annoy or offend (for example) another. This relates-back to the former problems with a prior Texas Harassment statute, where the Court of Criminal Appeals correctly opined that "criticism of official policies constitutes protected expression and does not become actionable simply because it is incorporated into an offense definition alongside unprotected activity." *Long v. Texas*, 931 S.W.2d 285, 294 (Tex. Crim. App. 1996).

Moreover, since *Barton* and *Sanders* dealt with the pre-2017 version of the Texas Harassment statute, there is no binding decision which holds the newer statute constitutional. And the Accused would urge that this court adopt the line of reasoning from *Counterman v. Colorado*, 600 U.S. 66 (2023) that dealt with a Colorado statute making it unlawful to "[r]epeatedly . . . make[ ] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." COLO. REV. STAT. §18-3-602(1)(c). Most notably in *Counterman*, the issue was whether the statute restricted unprotected speech as falling into the category of "true threats." 600 U.S. 66. It was never a question whether repeated communications were not speech at all—it was a given that repeated communications are speech. *See Id*.

3. The second paragraph of the information does not provide sufficient notice to meet the charges, and to bar by jeopardy multiple convictions and subsequent prosecutions.

Texas law guarantees an accused the right to have an indictment present fair notice of the charges against him. Articles 21.04 and 21.11 of the Texas Code of Criminal Procedure require that an indictment must contain "that degree of certainty that will give the defendant notice of the particular offense with which he is charged" and "enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense." TEX. CODE CRIM. PROC. ANN. ARTS. 21.04, 21.11; *See also McElroy v. State*, 720 S.W.2d 490, 492 (Tex. Crim. App.1986) (holding that an indictment must "particularize the act complained of so that its identity cannot be mistaken").

A. Failure to identify the posts deprives the accused adequate notice as to what accusation he is prepared to meet at trial.

The information alleges that the defendant committed the offense specifically "by posting alarming, threatening, and vulgar posts on social media." The information does not allege with reasonable certainty what posts the defendant allegedly made, on which platform, or the content of them. The information alleges, argumentatively, that said posts are "alarming, threatening, and vulgar." The failure to particularize the alleged posts content substitutes the state's argument for concrete facts, and is fatal to the information. The language of the statute itself contains several different vague and undefined possible intentions and possible communications that it would be necessary to identify more specifically the communications at issue. *See United States v. Williams*, 553 U.S. 285, 306 (2008)("we have struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent"—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.")

42.07(a)(1) has six possible mental states and seven possible objective circumstances surrounding culpable acts; coupled with a definition of "electronic communication" under 42.07(b)(1)(A)-(B) that includes fourteen examples. A close analogy to the harassment statute's numerous permutations, is Theft. TEX. PEN. CODE. § 31.03.

As the Texas Court of Criminal Appeals in *Geick v. State,* 349 S.W.3d 542, 546 (Tex. Crim. App. 2011) noted: "the simplicity of the statutory elements of theft hides the complexity … three ways in which appropriation can be unlawful, to [sic] ways to appropriate, three types of property, and three ways to deprive," the court went on to explain that pursuant to the code's definitions, there are five listed ways in which consent is not effective, and looking to definitions within the penal code could be combined to offer eleven different definitions of coercion and deception. *Id*. The court in *Geick* opined that to preserve any objection to the indictment, it must take the form of a notice-based motion to quash. *Id*.

Other courts have held the State to greater specificity than the information in this cause. In *Amaya v. State*, 551 S.W.2d 385 (Tex. Crim. App. 1977), for example, the Court of Criminal Appeals reversed a conviction for making a false statement because the charging instrument

merely tracked the statutory language and made "no attempt to set out the specific 'willfully false statement' the [defendant] was alleged to have made." Id. at 386. In reversing the conviction, the Court concluded that the defendant "was entitled, upon proper exception, to know which false statement or statements the State would rely upon for conviction." Id. at 387.

Similarly, in *Cooke v. State*, 824 S.W.2d 334 (Tex. App.—Houston [1 st Dist.] 1992, pet. ref'd), the court reversed a conviction for tampering with government records under Tex. Penal Code Ann. § 37.10(a)(2). The indictments simply tracked the statutory language and alleged that the defendant did "knowingly make and present a record, document, and thing…with knowledge of its falsity…." The defendant filed a motion to quash the indictments because they did not identify which entry or entries in the documents were allegedly false. The appellate court held that the trial court's denial of the motion to quash was reversible error because the defendant "was forced to speculate which particular entry might form the basis of the prosecutor's case." *Id*. at 338.

Other cases where the State should have, after objection, provided specific allegations of manner or means used in the commission of the offense are: *Castillo v. State,* 689 S.W.2d 443, 446 (Tex. Crim. App. 1985)(in an arson case, the State should have alleged the manner and means of starting the fire); *Doyle v. State,* 661 S.W.2d 726, 730 (Tex. Crim. App. 1984)(in a retaliation case, the State should have alleged the manner and means to communicate the threat); *Jeffers v. State,* 646 S.W.2d 185, 188 (Tex. Crim. App. 1983)(in a gambling case, the State should have alleged the manner and means the defendant used to receive bets); *Haecker v. State,* 571 S.W.2d 920, 921-22 (Tex .Crim. App. 1978)(in a cruelty to animals case, the State should have specified the manner of torture).

In this case, the court should quash the information because there is no way to tell from the information what the government claims constituted the "alarming, vulgar, or threatening posts on social media."

B. The information is not sufficiently definite to bar subsequent prosecution for the "same offense" upon a negotiated plea of guilty to the offense.

The double jeopardy clause protects protects against multiple prosecutions for the same offense. *Jeffers v. U.S.*, 432 U.S. 137; *Ex parte Kopecky*, 821 S.W.2d 957 (Tex. Crim. App. 1998). For double jeopardy purposes, the same offense means the identical criminal act, not the same offense by name. *Ex parte Goodbread*, 967 S.W.2d 859 (Tex. Crim. App. 1998).

When raising a claim of double jeopardy, if it cannot be determined from the state's pleadings whether the offenses prosecuted are the same, the court must look for the proof offered at trial. *Id*. In the context of a negotiated plea of guilty in this cause, a court in the future would not have a trial record to examine what evidence the state presented at trial to determine which particular posts constituted the alleged alarming, threatening, and vulgar posts.

C. The information, assuming it charges two counts of Harassment, is not sufficiently definite to prevent Riley Mix from being placed twice in jeopardy for the same offense in a single trial.

A double jeopardy violation occurs if the accused is tried twice for the same offense in a single trial even if the sentences run concurrently. *Ervin v. State*, 991 S.W.2d 804 (Tex. Crim. App. 1999)(where the offenses were manslaughter and intoxication manslaughter).

The first paragraph or count of the information alleges that the accused "intentionally, knowingly or recklessly **threaten** [sic] the complainant **in a manner reasonably likely to alarm** the complainant, to inflict bodily injury on the complainant," while the second paragraph or count alleges that the accused "[sent] repeated electronic communications to the complainant in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass or offend another, namely by **posting alarming, threatening** and vulgar posts on social media."

In any case, conduct which constitutes separate criminal acts may only be punished as a single criminal act if the multiple separate acts are incident to and subsumed by an ultimate final act. *Patterson v. State*, 152 S.W.3d 88 (Tex. Crim. App. 2004). E.g. if the accused has threatened the complainant with bodily injury, and has posted threatening posts on social media, but has only made the threat of bodily injury through the posts on social media, a conviction for both would violate the accused's right against double jeopardy. *See Id*.

PRAYER

For the reasons stated above and herein, or for reasons that may appear at a hearing on this motion, Riley Mix prays that the court quash the information.

Respectfully submitted,

PANTHEON LEGAL GROUP, PLLC

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CERTIFICATE OF SERVICE

This is to certify that on November 10, 2024, that a true and correct copy of the above and foregoing document was served on Collin County District Attorney's Office, via the Texas Electronic Filing System.

/s/ *James T. Chiles*

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