No. 01-24-00855-CR

In the First Court of Appeals

Shawn Paul Robinson
v.
The State of Texas

Cause No. 1644504
Appealed from the 351st Judicial District Court
Harris County, Texas

Brief of Appellant Shawn Paul Robinson

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Appellant requests oral argument.

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Trial Judge	Honorable Natalia Cornelio

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Statement of the Case

This is a case involving a prosecution for online solicitation of a minor.

A jury convicted Mr. Robinson, and the trial court sentenced Mr. Robinson to six years in prison. (RR 49.)

This appeal timely followed.

Statement Regarding Oral Argument

This case presents a question of statutory interpretation, implicating broad philosophical questions of literal meaning and apparent legislative intent. Oral argument will help this Court sort the question out.

Issues Presented

The trial court erred in denying Mr. Robinson a requested jury instruction under section 33.021(e)(2) of the Texas Penal Code, that if the jury found Mr. Robinson was not more than three years older than V. Brady at the time of the alleged communication and that V. Brady consented to the solicitation, then Mr. Robinson would have a complete defense to the Online Solicitation of a Minor offense.

Statement of Facts

Mr. Robinson solicited Vanessa Brady, a police officer whom (the facts supported) he believed to be less than 17 years of age, to meet him for sex.

Mr. Robinson was born on April 2 1981. (RR3:64.) Brady, the complainant, was born before April 2, 1984. (RR3:93–94.)

Brady had not discouraged Mr. Robinson from soliciting her. (State's Exhibits 1, 2.) It was her job to agree to let people solicit her for sex. (RR4:50.)

Summary of the Argument

It is beyond dispute that Mr. Robinson is not more than three years older than the minor. There was evidence from which a jury could find that the minor consented to Mr. Robinson's solicitation.

Mr. Robinson was entitled to the defensive jury charge from section 33.021(e)(2) of the Texas Penal Code.

Argument on Sole Point of Error: Omission of the defensive charge was error.

The jury charge must "distinctly set[] forth the law applicable to the case[,] not expressing any opinion as to the weight of the evidence." Tex. Code Crim. Pro. Ann. art. 36.14. "A jury charge which tracks the language of a particular statute is a proper charge on the statutory issue." *Riddle v. State*, 888 S.W.2d 1, 8 (Tex. Crim. App. 1994).

An accused is entitled to an instruction on every defensive issue raised by the evidence. (*Hayes v. State*, 728 S.W.2d 804, 807 (Tex. Crim. App. 1987).

Here, the jury charge did not distinctly set forth the law applicable to the case, and did not track the language of the statute. The evidence raised a defensive issue under section 33.021(e)(2); Mr. Robinson requested such an instruction, and the trial court refused it. That refusal was error.

The standard for reversal is "some harm," and the record shows that Mr. Robinson suffered some harm.

1. Preservation, Standard of Review, and Harm

1.1. Mr. Robinson preserved this error.

Mr. Robinson requested the defensive jury charge in writing, timely, with both a general request (CR174) and specific proposed language (CR176). He even briefed the issue for the trial court. (CR179.)

1.2. The standard of review is "some harm."

Because Mr. Robinson timely requested the defensive jury charge, the standard of review is "some harm." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984)

1.3. Mr. Robinson was harmed by the omission of the defensive charge.

This Court must "look to the whole record" to determine harm, *Almanza*, 686 S.W.2d at 173.

Mr. Robinson put all his eggs in the section 33.021(e)(2) basket. Section 33.021(e)(2) was Mr. Robinson's only defense from the beginning of the trial. In voir dire he sought "twelve people who can commit to following the law, even if the law is confusing, even if it does not seem logical." (RR3:116.) In opening he simply directed the jury to keep its eye on the ball—that the police-officer complainant, and not some "persona," was the minor solicited (RR4:20), which was only important because the 33.021(e)(2) defense makes the age of the minor

the determining factor. And although the jury was instructed on entrapment, and Mr. Robinson, deprived of his 33.021(e)(2) defense, argued entrapment, entrapment had not been an issue in the trial—only the State had said the word. (CR3:59, 63, 67, 68, 77, 80, 81, 83.)

Without his section 33.021(e)(2) defense, the jury was required to convict Mr. Robinson. If the jury had been properly instructed, they would, based on this record, have been required to acquit.

2. The general rule of statutory construction is plain meaning.

The "sole object of the interpretative enterprise is to determine what a law *says*." *Lawson v. FMR LLC*, 571 U.S. 429, 459–60 (2014) (Scalia, J., dissenting). Courts must "give effect to the plain meaning of the statute's language if possible." *Ex parte Reeder*, 691 S.W.3d 628, 632 (Tex. Crim. App. 2024).

2.1. Courts must interpret—not create—the law

Plain meaning is "determined by reading the statute in context, reasonably giving effect to each word, phrase, clause, and sentence, and constructing them according to applicable rules of grammar and common usage, to include technical definitions." *Id.* Rewriting a statute that is not readily susceptible to a different interpretation "constitutes a serious invasion of the legislative domain[.]" *Ex parte Thompson*, 442

S.W.3d 325, 339 (Tex. Crim. App. 2014). It is not "the duty of the courts to supply omissions in a law or to question the wisdom thereof." *State ex rel. Vance v. Hatten*, 600 S.W.2d 828, 830 (Tex. Crim. App. 1980). "[T]he statute must be construed as it is written by the legislature." *Id.*

Like the Court of Criminal Appeals, the Texas Supreme Court has "repeatedly branded reliance on extrinsic aids as 'improper' and 'inappropriate' when statutory language is clear." *Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 136 (Tex. 2018) (cleaned up).

2.2. When a statute's meaning is clear, its plain language controls; judicial interpretation ends

"In divining legislative intent, we look first to the language of the statute[,]" and "[w]hen the meaning is plain, we look no further." *McClintock v. State*, 541 S.W.3d 63, 67 (Tex. Crim. App. 2017) (quoting *State v. Daugherty*, 931 S.W.2d 268, 270 (Tex. Crim. App. 1996), which in turn cites *Boykin v. State*, 818 S.W.2d 782, 784–86 (Tex. Crim. App. 1991)).

The Supreme Court wrote in *Helvering*:

> Nor can we avoid the plain meaning of a statute by construction, so-called, because we think as written it begets 'hard and objectionable

> or absurd consequences, which probably were not within the contemplation' of its framers.

Helvering v. New York Tr. Co., 292 U.S. 455, 470 (1934).

"Probably not within the contemplation" is not "could not have contemplated." Consequences that probably were not within the contemplation of the legislature cannot be avoided; consequences that could not have been contemplated might be.

The consequences of a plain reading of section 33.021(c) may not have been within the contemplation of the Texas Legislature, but they could have been contemplated—any competent lawyer would have seen the application.

> It is of course absurd to interpret a *criminal statute* on the basis of one's perception as to whether its "spirit" has been violated[.]

Crandon v. United States, 494 U.S. 152, 179 (1990) (Scalia, J., dissenting).

When the language employed by the legislature allows no other meaning, it must be followed even if it leads to "absurd and irrational decisions." *Kohlsaat v. Murphy*, 96 U.S. 153, 160 (1877).

2.3. Policy decisions by the courts undermine legislative authority and violate separation of powers.

> [No] person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

Tex. Const. Art. II, § 1.

> The Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled "The Legislature of the State of Texas."

Id. Art. III, § 1.

Under Texas's separation-of-powers scheme, only the legislature is authorized to make an act a crime. *Martinez v. State*, 323 S.W.3d 493, 501 (Tex. Crim. App. 2010). "Where the meaning of the [statutory] words used is plain, the act must be carried into effect according to its language, or the courts would be assuming legislative authority." *Sparks v. State,* 76 Tex. Crim. 263, 174 S.W. 351, 352 (Tex. Crim. App. 1915).

Courts must "confine [their] interpretation to a reasonable construction of the language used in the statute as written." Hatten, 600 S.W.2d at 830. Judges implementing policy "depart[] from what Framers such as Madison stated, what jurists such as Marshall and Scalia did, what judges as umpires should strive to do, and what this

Court has actually done across the constitutional landscape for the last two centuries." *United States v. Rahimi*, 602 U.S. 680, 731 (2024) (Kavanaugh, J., concurring).

2.4. Statutes that they may be read to allow a court to ignore the plain language of an unambiguous statute, too, violate separation of powers.

It is the Legislature's job to write law, and to do so in ways that the People can readily understand.

> It is a well recognized rule that the legislature may not delegate its legislative powers, except as expressly permitted in the constitution, and any attempt to commit those powers to another agency is invalid.

Ex parte Granviel, 561 S.W.2d 503, 514 (Tex. Crim. App. 1978).

Statutes such as section 1.05 of the Texas Penal Code that purport to allow less than strict construction of statutes, and statutes such as section 311.023 of the Texas Government Code that allow courts to consider factors other than the statutory text in interpreting unambiguous statutes, are attempts to delegate legislative powers, void under Article II, section 1 of the Texas Constitution.

3. The remedy for "bad policy" lies with the legislature alone.

When laws have absurd consequences that the legislature probably did not contemplate, even "to the surprise of the lawmaker himself," "the

remedy lies with the lawmaking authority, and not with the courts." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

One reason that the remedy lies with the legislature is that if a court were to rewrite a badly written statute, it "would sharply diminish the legislature's incentive to draft a narrowly tailored statute in the first place." *Ex parte Thompson*, 442 S.W.3d 325, 339 (Tex. Crim. App. 2014).

4. By following plain language, courts respect legislatures.

> The seminal rule of statutory construction is to presume that the legislature meant what it said. In adhering to this rule, we show our respect for the legislature and recognize that if it enacted into law something different from what it intended, it should amend the statute to conform to its intent.

Armstrong v. State, ___ S.W.3d ___, No. PD-0409-22, 2025 WL 1517410, at *3 (Tex. Crim. App. May 28, 2025) (cleaned up).

5. The plain meaning of section 33.021(e)(2) gives Mr. Robinson a defense to prosecution.

A *minor* is not always a *child*. In section 33.021, the Legislature has defined *minor*:

> (A) an individual who is younger than 17 years of age; or
> (B) an individual whom the actor believes to be younger than 17 years of age.

Tex. Penal Code § 33.021(a)(1). This definition applies to both subsection (c) and subsection (e)(2).

In both subsections (a)(1)(A) and (a)(1)(B), the *minor* is an individual. "Individual" means "a human being who is alive," Tex. Penal Code § 1.07(a)(26). An imaginary or fictive person is not an "individual." What follows "an individual" in each of (1)(A) and (1)(B) is a limiting clause. A human being is a *minor* under subsection (A) only if he or she is younger than 17 years of age; a human being is a *minor* under subsection (B) only if the actor believes him or her to be younger than 17 years of age. But the actor's belief does not make the human being younger than 17—if the actor's belief changed the age of the *minor*, subsection (B) would be redundant.

A human being who is 50 years old, but whom the actor believes to be 15, is still 50.

> When the statute is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute. Thus, we assume that the legislature means what it said and derive the statute's meaning from the words that the legislature used.

Miles v. State, 506 S.W.3d 485, 487 (Tex. Crim. App. 2016) (cleaned up).

6. The statute is not ambiguous.

The meaning of section 33.021(e)(2) is not ambiguous: the *minor* is Brady, a human being who, despite Mr. Robinson's belief, has a certain age; Mr. Robinson is not more than three years older than that age; if Brady consented to Mr. Robinson's solicitation, he has a defense. There is no other way to read the plain language of the statute.

The State might, despite that plain meaning, attempt to argue that the age of the *minor*, for purposes of section 33.021(e)(2), is the age *that the actor believed the minor to be*, instead of the age of the *minor*. That would do violence to the language of the statute.

Imagine if Mr. Robinson were being prosecuted for soliciting a child (a 33.021(a)(1)(*A*) minor) whom he claimed to have believed to be a 50-year-old adult, instead of an adult whom he believed to be a child. The State would be arguing that it is the actual age of the individual—the child—that is relevant to a 33.021(e)(2) defense, and not the age that the actor believes the child to be.

The State might even, in that case, argue that the Legislature has shown, in subsection (f) (which does not apply here) that it knows the difference between the age of the *minor* and the age that the actor

believes the *minor* to be, so that when it references one it is not referencing the other:

> An offense under Subsection (b) is a felony of the third degree, except that the offense is a felony of the second degree if the minor is younger than 14 years of age or is an individual whom the actor believes to be younger than 14 years of age at the time of the commission of the offense.

Tex. Penal Code § 33.021(f).

The State would, there, be correct: the language of section 33.021(e)(2) is clear that it is the age of the *minor*—an individual, a living human being, whether a child or not—that matters. There is no way to read the statute to make the actual age of the *minor*—here Brady—irrelevant. The State, in arguing otherwise, argues for the nullification of the Legislature's statute.

The Legislature *could have* written section 33.021(e)(2) to make the age defense depend on the believed age of the "minor." Something like:

It is a defense that:
a) the actor was not more than three years older than the younger of:
the age of the minor; and
the age that the actor believed the minor to be; and
b) the minor consented….

The Legislature did not write *that* statute. Instead it made the age defense in section 33.021(e)(2) depend only on the age of the *minor*—of the human being whom the actor believed to be a child.

This Legislature's actual statute is not ambiguous. Its proper construction cannot be reasonably doubted. This Court is not constitutionally permitted to rewrite the statute to do what the State would like it to do.

According to the strict letter of the law, Mr. Robinson was entitled to the benefit of the defense.

7. *Hernandez* is neither binding nor persuasive.

The State in the trial court offered this Court's *Hernandez v. State* for its statement that:

> When a defendant solicited an ostensible minor who was actually a law enforcement officer, the defendant may raise a defense based on subsection (e)(2) only if the defendant believed that he was not more than three years older than the victim portrayed by the officer.

Hernandez v. State, No. 01-16-00453-CR, 2017 WL 6327371, at *3 (Tex. App.—Houston [1st Dist.] Dec. 12, 2017, pet. ref'd) (not designated for publication). That gloss is not derived in any way from the language of the statute, and *Hernandez* is nonbinding and poorly reasoned.

7.1. Hernandez is nonbinding.

Hernandez is not binding on any court, including this one. Tex. R. App. P. 47.7(a). A nonprecedential opinion such as *Hernandez* might be useful if it answered the same question and its reasoning were persuasive. But *Hernandez* does not answer the question here, except in dicta, and its reasoning is not persuasive.

7.2. Hernandez's answer was dicta.

Hernandez involved a "legal insufficiency" challenge. Such a challenge compares the evidence to the "hypothetically correct" jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). In *Hernandez* the appellant had not requested a 33.021(e) charge. Because the appellant had not requested the charge, it was not part of the "hypothetically correct charge"—appellate courts agree that charges on defenses only apply if they are given or requested. *Villa v. State*, 370 S.W.3d 787, 791 (Tex. App.—Eastland 2012), aff'd, 417 S.W.3d 455 (Tex. Crim. App. 2013); *Hernandez v. State*, 10 S.W.3d 812, 822 (Tex. App.—Beaumont 2000, pet. ref'd).

"Not part of the hypothetically correct charge" is all this Court needed to say in response to Mr. Hernandez's legal-insufficiency argument. Because the appellant in *Hernandez* had not even requested

the charge, this Court's statement about when a defendant is entitled to a 33.021(e) instruction was pure dicta.

7.3. Hernandez's reasoning is not rigorous.

This Court in *Hernandez* performed no analysis of the statute, no discussion of code construction. It merely cited a Court of Criminal Appeals case, *Sanchez*, that dealt with an entirely different question—whether the affirmative defense in section 22.011(e) can be raised in a prosecution under the general solicitation-of-a-child statute, section 15.031(b). *Sanchez*'s answer was that it could be but that it was "the circumstances surrounding the actor's conduct as the actor believes them to be" that control. *Sanchez v. State*, 400 S.W.3d 595, 599 (Tex. Crim. App. 2013).

Under section 15.031(b)—involved in Sanchez but not implicated here—if the actor, believing a child to be an adult, solicited sex from that child, he would not commit solicitation. Tex. Penal Code § 15.031(b). Under section 33.021(c), however, the actor's belief that the child was an adult would not be a defense. The reasoning of *Sanchez* cannot be imported—as this Court in *Hernandez* purported to import it—to a different statute with a different structure.

8. There are two possible exceptions to the plain-meaning rule.

"It is only when the text is ambiguous, or if the plain meaning of the words leads to absurd results, that extratextual factors are considered." *Reeder*, 691 S.W.3d at 632.

8.1. The result of plain meaning is not absurd.

Because a strict reading of the plain language of the statute benefits Mr. Robinson and the statute is not *ambiguous*, the State argues that a plain-meaning interpretation of the statute is *absurd*—that under such an interpretation "The application of the Age Defense and the entire Online Solicitation of a Minor Statute would become a lottery." (CR200.)

That *does* seem, as Mr. Robinson alluded in voir dire, illogical. It is—to use a less emotive word than "absurd"—incongruous.

But first, Mr. Robinson is not liable for how the statute might apply in other cases. The State's argument has to be that it is absurd *for Mr. Robinson*, despite what *he* did, to walk free—an emotive argument.

And second, the State's preferred reading of section 33.021(e)(2)—that "not more than three years older than the minor"[1] refers to the age

1. The State must propose a meaning for this phrase, because a Court is not permitted to add language to a statute. *State v. Markovich*, 77 S.W.3d 274, 283 (Tex. Crim. App. 2002).

Mr. Robinson believed the minor to be rather than the actual age of the *minor*—is more illogical than Mr. Robinson's, because a child who is solicited online by someone believing her to be an adult is in more danger than a police officer who is solicited online by someone believing her to be a child. If the defense applies to soliciting anyone, it should apply (as the plain language requires) to soliciting the police officer.

8.2. *Incongruous* is not in any case *absurd*.

The Legislature could simply repeal section 33.021(c). This would not be absurd. The Legislature could keep section 33.021(c) and repeal section 33.021. This would not be absurd either. The Legislature could limit the definition of "minor" to "a person under seventeen years of age." A court might find something undesirable about any of these policy choices, but courts are not policy makers.

Just as the Legislature could make those changes to section 33.021, it could write the statute to make it inapplicable to an actor who, believing that a grown-up who is not more than three years younger than him is a child, solicits that grown-up. This Court might find that policy undesirable—startlingly incongruous, even—but this Court does not make policy. It is fully within the Legislature's remit to make laws that make no sense to a court.

"The absurdity backstop requires more than a curious loophole." *Combs v. Health Care Services Corp.*, 401 S.W.3d 623, 630 (Tex. 2013). Even if the result of a strict reading of the plain language of the statute were incongruous in Mr. Robinson's case, that would not trigger the absurdity doctrine—the rule that requires a court to interpret a statute, in certain circumstances, to avoid an absurd outcome—even under the unconstitutional emotive version of the doctrine described below at 30.

9. There are two types of absurdity.

> Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd, or otherwise objectionable. But in such case the remedy lies with the lawmaking authority, and not with the courts.

Crooks, 282 U.S. at 60.

> He does not argue that it is absurd, however, in the sense that it is unworkable or inherently illogical.

Powell v. Hocker, 516 S.W.3d 488, 493 (Tex. Crim. App. 2017).

> You keep using that word. I do not think it means what you think it means.

The Princess Bride (Twentieth Century Fox 1987).

9.1. Legal Absurdity

"Absurd" in statutory interpretation is a term of art; absurdity doctrine does not allow a court to rewrite a statute simply because the result of a plain reading is inherently illogical. One of the doctrine's "limiting conditions is:

> The absurdity must be reparable by changing or supplying a particular word or phrase whose inclusion or omission was **obviously a technical or ministerial error** (e.g., *losing party* instead of *winning party*). The doctrine does not include substantive errors arising from a drafter's failure to appreciate the effect of certain provisions.

Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 238 (2012) (bold emphasis added). To justify a departure from the letter of the law on grounds of absurdity, "there must be something to make plain the intent of Congress that the letter of the statute is not to prevail." *Crooks*, 282 U.S. at 60. This is a highly demanding doctrine, "for judges have no license to rewrite a law's terms just because they happen to think different ones more sensible." *Pulsifer v. United States*, 601 U.S. 124, 180 (2024) (Gorsuch, J., joined by Sotomayor and Jackson, JJ., dissenting).

> The absurdity canon, properly understood, is an implementation of (rather than ... an exception to) the ordinary meaning rule. What the

> rule of absurdity seeks to do is what all rules of interpretation seek to do: *make sens*e of the text.

Bostock v. Clayton Cnty., Georgia, 590 U.S. 644, 789 fn.4 (2020) (Kavanaugh, J., dissenting) (cleaned up). The doctrine "reflects the law's focus on ordinary meaning rather than literal meaning." *Id.*

In section 33.021(e)(2) there is no divergence between ordinary meaning and literal meaning. The ordinary *and* literal meaning of "not more than three years older than" is "not born on a date three years before." What we have here is not legal absurdity, not a "technical or ministerial error," *Reading Law* at 238, in which a scrivener misspelled "worship," *id.* at 234–35, or a drafter substituted "losing" for "winning," *id.* at 235. If there is an error in the statute, it is a substantive error arising from the Texas Legislature's "failure to appreciate the effect," *id.* at 238, of section 33.021(e)(2)—an effect that the statute's framers could have, but likely did not contemplate. Such an error may not be corrected by the courts; the remedy lies with the Legislature.

Judge Yeary recently discussed the absurdity doctrine in a concurrence, quoting *Reading Law*:

> I have elsewhere registered my profound disapproval of this "effectuate-the-legislative-intent" brand of statutory construction. Instead, I agree with the assertion that the absurdity exception to the

> rule that plain meaning should prevail should never be relied upon "to revise purposeful dispositions that, in light of other provisions of the applicable code, make little if any sense." But that is what the Court does today.

Nicholson v. State, 682 S.W.3d 238, 251 (Tex. Crim. App. 2024) (Yeary, J., concurring) (cleaned up). (With regard to *Nicholson* it bears noting that a) the absurdity doctrine in the five-judge majority opinion was dicta, unnecessary to the resolution of the case; and b) three of the five judges in the majority no longer serve on the Court.)

The Texas Supreme Court recently quoted approvingly *Reading Law*'s observation that the absurdity doctrine does not apply "to what a court might view as a substantive error arising from a drafter's failure to appreciate the effect of certain provisions." *Matter of T.V.T.*, 675 S.W.3d 303, 309 (Tex. 2023) (per curiam).

This Court too has recognized the limitations on the absurdity doctrine that *Reading Law* describes as "necessary to prevent 'judicial revision of public … texts to make them (in the judges' view) more reasonable.'" *Paulsen v. Yarrell*, 537 S.W.3d 224, 233 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

The legal-absurdity doctrine is not about correcting the Legislature when it writes statutes with absurd results. It:

> is a highly demanding doctrine—deliberately so, for judges have no license to rewrite a law's terms just because they happen to think different ones more sensible.

Pulsifer, 601 U.S. at 180 (Gorsuch, J., joined by Sotomayor and Jackson, JJ., dissenting).

The Legislature is entitled to write statutes that reasonable people think are absurd, and it is not the courts' job to rewrite those statutes. To the contrary, by applying the law as written, a court both shows respect for the Legislature and motivates the Legislature to do its job.

9.2. Emotive Absurdity

In contrast to the tightly constrained absurdity doctrine described by *Reading Law*, Texas courts assert that the plain meaning of a statute may be disregarded, regardless of whether the absurdity was "obviously a technical or ministerial error," *Reading Law* at 238.

This is *emotive absurdity*—an untethered rule for giving the Legislature's chosen words a court's preferred meaning.

9.3. The Court of Criminal Appeals first used the language of emotive absurdity in 1990.

The one case Texas courts rely on in defense of emotive absurdity is—as Mr. Robinson shows below at 36— *Boykin*:

> There is, of course, a legitimate exception to this plain meaning rule: where application of a statute's plain language would lead to absurd consequences that the Legislature could not possibly have intended, we should not apply the language literally. *Faulk v. State,* 608 S.W.2d 625, 630 (Tex.Cr.App.1980).

Boykin, 818 S.W.2d at 785.

But what *Boykin* said *Faulk* said is not what *Faulk* said:

> [W]hen literal enforcement would lead to consequences which the Legislature could not have contemplated, courts are bound to presume that such consequences were not intended and adopt a construction which will promote the purpose for which the legislation was passed.

Faulk v. State, 608 S.W.2d 625, 630 (Tex. Crim. App. 1980) (emphasis added).

Faulk's "could not have contemplated" language appears repeatedly in Texas criminal cases before 1990. *See, e.g., Newsom v. State*, 372 S.W.2d 681, 683 (Tex. Crim. App. 1963) (courts are bound to presume that consequences the legislature *could not have contemplated* were not

intended); *Baldridge v. State*, 167 Tex. Crim. 519, 520 (1959) (same). That is the correct rule.

But *Faulk*'s "could not have contemplated" became, in *Boykin*, "could not possibly have intended." *Boykin*, 818 S.W.2d at 785. That is an incorrect rule.

In terms of the legal doctrine of absurdity, a legislature "could not have contemplated" that a drafting error or a scrivener's error would change the entire meaning of a statute; a legislature "could not have intended" "purposeful dispositions that, in light of other provisions of the applicable code, make little if any sense," *Nicholson*, 682 S.W.3d at 251 (Yeary, J., concurring).

This Court might correct drafting errors and scrivener's errors—the things that the Legislature *could not have contemplated*. It may not correct nonsensical dispositions that the Legislature could have contemplated, had it but contemplated.

9.4. "Could not have contemplated" is not "could not possibly have intended."

The difference between "could not have contemplated" and "could not possibly have intended" is the difference between "impossible" and "inconceivable."

The Legislature could have—should have—contemplated the plain and literal meaning of section 33.021(e)(2). It is not this Court's job to correct for the effects that the Legislature should have contemplated, no matter how distasteful this Court finds those results.

> The statute might not cover conduct as the Court wants, but that is not the same as its being absurd. We are not the legislature; we must deal with the statute that the legislature and the governor enacted.

Sanchez v. State, 995 S.W.2d 677, 693 (Tex. Crim. App. 1999) (Womack, J., concurring).

No other interpretation of section 33.021(e)(2) is reasonably possible. *But*, the State will say, *this result is a harsh one!*

> To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body.

St. Louis, I.M. & S. Ry. Co. v. Taylor, 210 U.S. 281, 295 (1908).

9.5. It appears that no Texas appellate court has ever applied the emotive-absurdity doctrine to broaden an offense or narrow a defense.

Mr. Robinson has surveyed Texas cases citing *Boykin*, and has found many that cite but do not apply *Boykin*'s emotive-absurdity doctrine, and a few that apply the doctrine to other types of statutes, the nearest being *Basden*, in which the Court of Criminal Appeals refused to apply the unambiguous plain language of article 42.08(b) of the Texas Code of Criminal Procedure (governing the stacking of sentences for crimes committed by inmates) on grounds of emotive absurdity. *Basden v. State*, 897 S.W.2d 319, 321 (Tex. Crim. App. 1995).

Mr. Robinson has not found a case that has either *broadened an offense* or *narrowed a defense* (as the State will ask this Court to do) based on the fact that the plain meaning of an unambiguous statute's plain meaning leads to results that the court considers illogical .

This is consistent with Mr. Robinson's theory, discussed below at 11, that emotive absurdity was historically a doctrine applied only in favor of the accused, to narrow the categories of people who might be liable under a penal statute.

It is consistent also with the common-law rule (which became part of due course of law when the Texas Constitution was written) that a penal

statute must be interpreted strictly in favor of the accused. *See* below at 12.

9.6. The emotive-absurdity doctrine in Texas rests entirely on *Boykin*.

Never has the Court of Criminal Appeals provided any legal analysis in support of *Boykin*. All of the Court's post-*Boykin* "absurdity" opinions always lead directly back to *Boykin*, which in turn cites only *Faulk*, which—as discussed above at 31—did not say what the Court of Criminal Appeals said it said.

For example, in *Brown* the Court of Criminal Appeals said:

> We will, however, also resort to extratextual sources to construe a statute if we decide that the statute is ambiguous or that construing the statute according to its plain textual meaning will lead to "absurd consequences."

Brown v. State, 98 S.W.3d 180, 183 (Tex. Crim. App. 2003). For this proposition the Court cited *Jordan v. State*, which in turn cited only *Boykin*. *Jordan v. State*, 36 S.W.3d 871, 873 (Tex. Crim. App. 2001).

Similarly, *Cary v. State*, 507 S.W.3d 750, 756 (Tex. Crim. App. 2016), cited only *Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011), which cited only *Boykin*.

Likewise, the Court in *Liverman* cited both *Yazdchi* and *Boykin* for the same proposition. *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim.

App. 2015). *Yazdchi* cited *Boykin* and *Valdez*. *Yazdchi v. State*, 428 S.W.3d 831, 837–38 (Tex. Crim. App. 2014). *Valdez*, however, cites only *Boykin*. *Ex parte Valdez*, 401 S.W.3d 651, 655 (Tex. Crim. App. 2013).

This process of laundering legal propositions through multiple cases is puzzling. Why cite cases that cite only *Boykin*, instead of simply citing *Boykin*? Is it so that the proposition appears to have more support than it in fact has?

In fact, it's worse. Of the cases in this proposition-laundering chain, only in *Valdez*—a habeas case involving a parole-eligibility question—did the Court apply the emotive-absurdity doctrine. *Valdez*, 401 S.W.3d 651. In the other cases, the reference to the absurdity of an unambiguous statute is mere dicta. So not only is the Court of Criminal appeals laundering *Boykin*'s emotive-absurdity proposition through multiple other cases, but it is doing so through multiple other cases in which the proposition is dicta.

9.7. The emotive-absurdity language in *Boykin*, too, is dicta.

In *Boykin*, the result did not depend on the emotive-absurdity doctrine. *Boykin*, 818 S.W.2d 782.

9.8. The Court of Criminal Appeals has never justified Boykin's emotive-absurdity doctrine.

The Court of Criminal Appeals has never confronted *Boykin's* dicta in light of separation of powers, nor in light of due course of law or the deference due the Legislature's words.

10. The emotive-absurdity doctrine violates separation of powers.

"[W]here the meaning is plain, no consequences are to be regarded in the interpretation, for this would be assuming a legislative authority." *Williams v. Jenkins*, 25 Tex. 279, 288 (1860).

11. Historically, something like the emotive-absurdity doctrine was applied as a decisional rule of lenity.

The historical record shows the Supreme Court *limiting* the meaning of words to avoid "absurd consequences or flagrant injustice." *Sorrells v. United States*, 287 U.S. 435, 446–48 (1932). Examples cited in *Sorrells* include (descriptions are from *Sorrells*):

- *United States v. Palmer*, 16 U.S. 610 (1818), in which Chief Justice Marshall concluded that 'general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them.'
- *United States v. Kirby*, 74 U.S. 482 (1868), in which the Court held that the statute providing for the conviction of any person who 'shall, knowingly and wilfully, obstruct or retard the passage of the mail, or of any driver or carrier … carrying the same' had no

application to the obstruction or retarding of the passage of the mail or of its carrier by reason of the arrest of the carrier upon a warrant issued by a state court

- *Lau Ow Bew v. United States*, 144 U.S. 47 (1892), in which the Court decided that a statute requiring the permission of the Chinese government, and identification by certificate, of 'every Chinese person, other than a laborer' did not apply to Chinese merchants already domiciled in the United States.
- *United States v. Katz*, 271 U.S. 354, 362 (1926), in which the Court declared that general terms descriptive of a class of persons made subject to a criminal statute may and should be limited, where the literal application of the statute would lead to extreme or absurd results, and where the legislative purpose gathered from the whole act would be satisfied by a more limited interpretation.

The Court did not always apply emotive absurdity doctrine. In one pre-*Sorrells* case in which people in materially identical positions were treated differently because of incidental facts, the Supreme Court held that the remedy lay with Congress. The courts' duty, wrote the Court, "is simply to enforce the law as it is written, unless clearly unconstitutional." *Chung Fook v. White*, 264 U.S. 443, 446 (1924).

But in criminal cases, the Court appears to have applied emotive absurdity doctrine only in favor of the accused.

12. Lax construction against the accused violates due course of law.

> No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

Tex. Const. Art. 1, § 19.

Texas law came, by statute, from the common law. *Bailey v. Haddy*, Dallam 376, 378 (1841). In criminal cases, especially, early Texas courts looked to the common law for the rule of practice. *Hyde v. State*, 16 Tex. 445, 454 (1856). This *common-law rule of practice* was "the due course of law" referred to in the Constitution.

Of course, due course of law is only a floor on the process required. The framers of the Texas Constitution themselves "made considerable innovations in the practice of that very code which they had just adopted," *Republic of Tex. v. Smith*, Dallam 407, 410 (1841), and the U.S. Constitution may in some regards provide more protection than the Texas Constitution alone would.

But the strict construction of penal statutes in favor of the accused was a common-law requirement at the time of the adoption of, and is therefore a required component of due course of law under, the Texas Constitution. *See Republic of Tex. v. Bynum*, Dallam 376 (1841) (penal laws "always construed in the mildest sense for the accused"). This

doctrine is "fundamental in English and American Law." *Murray v. State*, 2 S.W. 757, 761 (Tex. App. 1886, no pet.). Due course of law requires lenity where the statute is ambiguous, and does not allow a Court to interpret an unambiguous statute against the accused, where the statute's plain language favors the accused.

An interpretation of section 33.021 that neither favors Mr. Robinson nor follows the plain language of the statute cannot constitutionally be applied. The trial court was required to follow the plain language of section 33.021(e)(2), and give Mr. Robinson the benefit of the defense.

12.1. To the extent they allow a court to interpret an unambiguous statute against the accused, where the statute's plain language favors the accused, other statutes violate due course of law.

Because due course of law requires that an ambiguous statute be strictly construed in favor of the accused, statutes such as section 1.05 of the Texas Penal Code and section 311.035 of the Texas Government Code, as far as they apply to penal statutes, violate Article I, section 19 of the Texas Constitution.

13. Conclusion

Here, as in *Iselin*, the statute's language is "plain and unambiguous"; the State is going to ask that this court "transcend[] the judicial

function" by supplying omissions in the statute. *Iselin v. United States*, 270 U.S. 245, 251 (1926).

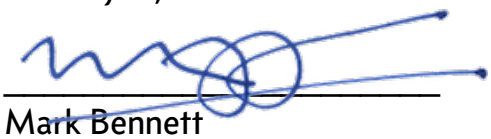
This court may not do so.

The law applicable to the case includes a section 33.021(e)(2) defense. Mr. Robinson is entitled to a new trial with an instruction to include the defensive instruction in the jury charge.

Prayer

Mr. Robinson prays that this Court reverse and remand with an instruction to include the defense that he is entitled to by law, and give him any other relief to which he is entitled.

Thank you,



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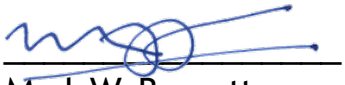

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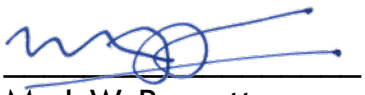

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