# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**NOS. PD-0096-21, PD-0097-21**

**THE STATE OF TEXAS**

**v.**

**JASPER ROBIN CHEN, Appellee**

**ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS HARRIS COUNTY**

**KELLER, P.J., filed a dissenting opinion in which KEEL and MCCLURE, JJ., joined.**

In *Ex parte Barton* and *Ex parte Sanders*, the Court addressed the constitutionality of the 2001 and 2013 versions, respectively, of the electronic-communications statute.[1] In both cases, the Court decided that the statute at issue does not implicate the First Amendment because the conduct

[1] *Ex parte Barton*, ___ S.W.3d ____, 2022 WL 1021061, *1 & n.1 (Tex. Crim. App. April 6, 2022) (2001 version); *Ex parte Sanders*, ___ S.W.3d ____, 2022 WL 1021055, *1 & n.1 (Tex. Crim. App. April 6, 2022) (2013 version).

it prohibits is not speech.[2] Now the Court concludes that the reasoning in those opinions applies to this case, involving the 2017 version of the statute, despite the fact that the 2017 statute adds new language regarding the meaning of "electronic communications" that makes the statute more obviously directed at speech.

Under the 2001 and 2013 versions of the statute, "electronic communications" was defined as:

> [A] transfer of signs, signals, writing, images, sound, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system. The term includes:
>
> (A) a communication initiated by electronic mail, instant message, network call, or facsimile machine; and
>
> (B) a communication made to a pager.[3]

In 2017, the legislature added to subsection (A) the italicized language below:

> (A) a communication initiated by 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.[4]

In *Barton* and *Sanders*, I set forth my view that derogatory posts about someone on a social media account or an internet site was criminalized even under the language of the 2001 and 2013 versions of the statute.[5] In concurring opinions in those cases, Judge Yeary disagreed, believing that

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[2] *See Barton*, *supra* at *1, and *Sanders*, *supra* at *1.

[3] TEX. PENAL CODE § 42.07(b)(1) (2001 & 2013).

[4] TEX. PENAL CODE § 42.07(b)(1)(A) (2017).

[5] *Barton*, 2022 WL 1021061, at *9 (Keller, P.J., dissenting); *Sanders*, 2022 WL 1021055, at *15 (Keller, P.J., dissenting) (adopting reasons articulated in *Barton*).

the statute was limited to instances in which "harassing communications are directed and targeted specifically at an individual."[6] In support of his assessment, he quoted the definition of "electronic communications" found in the versions of the statute at issue in those cases.[7] But with its additions, the 2017 statute clearly applies beyond communications that are targeted and directed specifically at an individual. Now, it seems indisputable that annoying posts *about* an individual on social media, a message board, a blog, or the online comment section of a newspaper can be an offense. Nothing in the statutory language of the 2017 provision suggests that the social media account, message board, blog, or other internet site must belong to the person who reasonably finds the communications annoying.

For instance, under the 2017 statute, if a person makes more than one derogatory comment about another person on Facebook, Twitter, or YouTube, that conduct can be prosecuted as a crime. That is true even if the derogatory posts or videos are on the commenter's own account. Similarly, repeated derogatory posts in the online comment section of the local newspaper could give rise to criminal liability. Criticisms of a politician on a blog or message board could also pave the way for a criminal prosecution.

To be clear, *Barton* and *Sanders* did not hold that the legislature could validly punish the sort of speech proscribed by the electronic-communications statute; it held that the statute did not proscribe speech *at all.* I found that idea problematic with respect to the earlier versions of the statute at issue in *Barton* and *Sanders*. With respect to the newer version, I find that idea to be

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[6] *Barton*, 2022 WL 1021061, at *8 (Yeary, J., concurring); *Sanders*, 2022 WL 1021055, at *14 (Yeary, J., concurring).

[7] *Barton*, *supra* at *8 n.2; *Sanders*, *supra* at *14 n.2.

simply untenable—and certainly not something that would support a summary remand. I respectfully dissent.

Filed: August 24, 2022

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