In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-17-00393-CR

EX PARTE DAVID LOPEZ

On Appeal from the County Court at Law
Liberty County, Texas
Trial Cause No. CAL-12618

MEMORANDUM OPINION

Appellant David Lopez ("Lopez") is charged by information with the misdemeanor offense of unlawful disclosure or promotion of intimate visual material.[1] The complaint and information alleged that Lopez, on or about February 5, 2017, in Liberty County, Texas, did

> then and there, without the effective consent of [the complainant], intentionally disclose visual material, namely, photographs, depicting the complainant "with her buttocks exposed", and the visual material was "obtained by the defendant" under circumstances in which the

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[1] *See* Tex. Penal Code Ann. § 21.16 (West Supp. 2018). We cite to the current version of the statute because the subsequent amendment does not affect the outcome of this appeal.

> complainant had a reasonable expectation of privacy that the visual material would remain private, and the disclosure of the visual material caused harm to the complainant, namely, embarrassment, and the disclosure of the visual material revealed the identity of the complainant, namely, showing the complainant[']s face[.]

Section 21.16. is titled "Unlawful Disclosure or Promotion of Intimate Visual Material." Lopez was charged with a violation of Section 21.16 of the Texas Penal Code. Section 21.16(b) provides:

> A person commits an offense if:
> (1) without the effective consent of the depicted person, the person intentionally discloses visual material depicting another person with the person's intimate parts exposed or engaged in sexual conduct;
> (2) the visual material was obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private;
> (3) the disclosure of the visual material causes harm to the depicted person; and
> (4) the disclosure of the visual material reveals the identity of the depicted person in any manner, including through:
> (A) any accompanying or subsequent information or material related to the visual material; or
> (B) information or material provided by a third party in response to the disclosure of the visual material.[2]

The Legislature included several definitions in Section 21.16(a), including a definition of "[i]ntimate parts" which means "the naked genitals, pubic area, anus,

[2] *Id.* § 21.16(b).

buttocks, or female nipple of a person."[3] The statute also defines "[v]isual material" as:

> (A) any film, photograph, videotape, negative, or slide or any photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide; or
> (B) any disk, diskette, or other physical medium that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method.[4]

Lopez filed a written pretrial application for a writ of habeas corpus challenging the facial constitutionality of the statute. The trial court denied the application. On appeal, Lopez raises three issues challenging the constitutionality of the statute.

In issue one, Lopez argues the trial court erred in denying him relief because section 21.16 is facially unconstitutional in that it criminalizes speech that is protected by the First Amendment.[5] According to Lopez, section 21.16(b) "does not fall within a category of unprotected speech and does not satisfy strict scrutiny[.]" Lopez contends that section 21.16 "is overly broad in that it criminalizes a

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[3] *Id.* § 21.16(a)(1).
[4] *Id.* § 21.16(a)(5).
[5] The First Amendment to the United States Constitution provides, in relevant part, "Congress shall make no law . . . abridging the freedom of speech[.]" U.S. Const. amend I. The freedom of speech secured by the First Amendment is applicable to the States through the Fourteenth Amendment. *Schneider v. State*, 308 U.S. 147, 160 (1939).

substantial amount of free speech outside of its legitimate aims, including images that depict some degree of nude flesh but that are not necessarily sexually explicit." Lopez argues section 21.16 is neither narrowly drawn nor the least restrictive means of achieving its legitimate purpose because the statute's definition of "intimate parts" could hypothetically result in the prosecution of a grandmother who takes a picture of her granddaughter in a diaper with no shirt on and then posts the picture on social media or includes it in a slideshow at the granddaughter's high school graduation party. The State does not argue that the "Unlawful Disclosure or Promotion of Intimate Visual Material" fits within one of the recognized categories of unprotected speech,[6] nor does the State contend that we should fashion a new category of unprotected speech. Rather, the State contends that the trial court correctly denied the pretrial habeas because the statute in question is not overly broad or unconstitutional under an overbreadth analysis and that it survives any strict

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[6] *See United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (listing the categories of unprotected speech to include defamation, obscenity, incitement (to imminent unlawful action), speech integral to criminal conduct, true threats, fraud, "fighting words," child pornography, and grave and imminent threats to national security); *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (recognizing obscenity, defamation, fraud, incitement, and speech integral to criminal conduct as categories of unprotected speech).

scrutiny review because it serves a compelling governmental interest[7] and it is narrowly tailored.

Whether a criminal statute is facially unconstitutional is a question of law that we review de novo.[8] Generally, we presume a statute is valid, and the challenger has the burden to prove that the statute is unconstitutional.[9] However, when a law criminalizes speech based on its content, we presume that the law is unconstitutional, and the State then has the burden to rebut that presumption.[10]

> In the First Amendment context, there are two levels of scrutiny: strict scrutiny and intermediate scrutiny. Strict scrutiny applies when a statute constitutes a content-based regulation of expression. Under strict scrutiny, a regulation of expression may be upheld only if it is narrowly drawn to serve a compelling government interest. In this context, a regulation is "narrowly drawn" if it uses the least restrictive means of achieving the government interest.
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[7] According to legislative history, section 21.16 of the Texas Penal Code was enacted by the Texas Legislature to combat "a disturbing Internet trend of sexually explicit images disclosed without the consent of the depicted person, resulting in immediate and in many cases, irreversible harm to the victim." *See* Senate Research Center, Bill Analysis, Tex. S.B. 1135, 84th Leg., R.S. (2015). We note that the term "revenge porn[ography]" is also "popularly understood" or referenced as "nonconsensual pornography[.]" *See Patel v. Hussain*, 485 S.W.3d 153, 157 n.1 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (a civil case awarding damages for disclosure of private facts, among other things).

[8] *See Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013).

[9] *Id.* at 15.

[10] *Id.*

> . . . Under [intermediate scrutiny], the regulation "need not be the least speech-restrictive means of advancing the Government's interests." The requirement of narrow tailoring is satisfied if the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation. The regulation is considered "narrowly tailored" for intermediate-scrutiny purposes, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest."[11]

In construing a statute, we give effect to the plain meaning of the language in the statute, unless the statute is ambiguous, or the plain meaning would lead to absurd results that the Legislature could not have possibly intended.[12] In determining the plain meaning, we may employ tools such as rules of grammar and usage.[13] But, we presume that every word in a statute has been used for a purpose and that each word, clause, and sentence should be given effect if reasonably possible.[14]

Ordinarily, a facial challenge to the constitutionality of a statute can succeed only when it is shown that the statute is unconstitutional in all applications, and the defendant would have to show that "no set of circumstances exists under which [the statute] would be valid[]" or that the statute lacks any "plainly legitimate sweep[.]"[15]

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[11] *Ex parte Thompson*, 442 S.W.3d 325, 344-45 (Tex. Crim. App. 2014) (citations omitted).

[12] *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015).

[13] *Id.*

[14] *Id.*

[15] *Stevens*, 559 U.S. at 472 (quotations omitted); *State v. Johnson*, 475 S.W.3d 860, 864 (Tex. Crim. App. 2015).

The overbreadth claimant bears the burden of demonstrating that overbreadth exists.[16] The Supreme Court has recognized that in a facial challenge to a regulation of speech based on overbreadth, a law may be invalidated when "a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'"[17] "The overbreadth doctrine is 'strong medicine' to be employed with hesitation and only as a last resort."[18] In *State v. Johnson*, the Court of Criminal Appeals explained:

> The overbreadth of a statute must be "substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." The statute must prohibit a substantial amount of protected expression, and the danger that the statute will be unconstitutionally applied must be realistic and not based on "fanciful hypotheticals." The person challenging the statute must demonstrate from its text and from actual fact "that a substantial number of instances exist in which the Law cannot be applied constitutionally." The Supreme Court "generally do[es] not apply the 'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law." Moreover, the overbreadth doctrine is concerned with preventing the chilling of protected speech and that concern "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct." "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech

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[16] *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016) (citing *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988)); *Stevens*, 559 U.S. at 485 (Alito, J., dissenting) (citing *Virginia v. Hicks*, 539 U.S. 113, 122 (2003)).

[17] *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (quoting *New York v. Ferber*, 458 U.S. 747, 770-71 (1982)).

[18] *Ex parte Thompson*, 442 S.W.3d at 349 (citing *Ferber*, 458 U.S. at 769).

> or to conduct that is necessarily associated with speech (such as picketing or demonstrating)."[19]

A statute should not be invalidated for overbreadth merely because it is possible to imagine some unconstitutional application.[20] As the Supreme Court noted in *Broadrick v. Oklahoma*, the chilling effect of an overbroad law, significant though it may be, may not necessarily justify prohibiting all enforcement of that law, especially when the law pertains to a "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct."[21]

The legislative history of the Texas statute indicates it was enacted by the Texas Legislature to combat "a disturbing Internet trend of sexually explicit images" being disclosed "without the consent of the depicted person[.]"[22] The Legislature expressly recognized that publication of such images can result in "immediate and in many cases, irreversible harm to the victim[]" and that "[t]he victims are

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[19] 475 S.W.3d at 865 (citations omitted).

[20] *See In re Shaw*, 204 S.W.3d 9, 15 (Tex. App.—Texarkana 2006, pet. ref'd) (citing *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)); *Ex parte Victorick*, No. 09-13-00551-CR, 2014 Tex. App. LEXIS 5429, at *4 (Tex. App.—Beaumont May 21, 2014, pet. ref'd) (mem. op., not designated for publication).

[21] 413 U.S. 601, 615 (1973).

[22] Senate Research Center, Bill Analysis, Tex. S.B. 1135, 84th Leg., R.S. (2015).

frequently threatened with sexual assault, harassed, stalked, fired from jobs, and forced to change schools. Some victims have even committed suicide."[23]

In Appellant's opening brief, Appellant contends when discussing his first issue that the statute is not narrowly drawn nor the least restrictive means of achieving its purpose. In issue one, Appellant only articulated one specific complaint about the wording of the statute—the definition of "intimate parts." Appellant argues the definition is too broad because "several of [the statute's] potential applications would criminalize protected speech[,]" without explaining how or in what respect it

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[23] *Id*. A federal law has been proposed to prohibit or punish similar conduct. *See* Intimate Privacy Protection Act of 2016, H.R. 5896, 114th Cong. (2016). Texas is but one of many states that has enacted statutes to combat "revenge porn" or "nonconsensual pornography." *See generally Cyber Civil Rights Initiative*, https://cybercivilrights.org/revenge-porn-laws/ (last visited March 6, 2019) (reporting that forty-three states and the District of Columbia have such laws); Jennifer Leach, *What to do if you're the target of revenge porn*, Federal Trade Commission Consumer Information (Jan. 11, 2018), https://www.consumer.ftc.gov/blog/2018/01/what-do-if-youre-target-of-revenge-porn (stating "[t]here are laws against revenge porn in 38 states plus the District of Columbia" with a link to the cybercivilrights.org site). For further discussion regarding the topic there are numerous secondary sources available, including without limitation, Christian Nisttáhuz, Comment, *Fifty States of Gray: A Comparative Analysis of "Revenge-Porn" Legislation Throughout the United States and Texas's Relationship Privacy Act*, 50 Tex. Tech L. Rev. 333 (2018); Kelsey Benedick, Notes and Comment, *Eradicating Revenge Porn: Intimate Images as Personal Identifying Information*, 22 Lewis & Clark L. Rev. 232 (2018); James T. Dawkins IV, Comment, *A Dish Served Cold: The Case for Criminalizing Revenge Pornography*, 45 Cumb. L. Rev. 395 (2015); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, (2014).

would do so. Appellant claims his hypothetical of the grandmother taking a picture of her infant granddaughter "is but one of many impermissible permutations of this law's application." That said, Appellant presents no other hypotheticals and challenges no other specific wording of the statute in support of his proposition in issue one that the statute is overbroad. Additionally, he fails to explain how the statute could be more narrowly drawn. We conclude that the Appellant has failed to demonstrate from its text and from facts "'that a substantial number of instances exist in which the Law cannot be applied constitutionally.'"[24]

In Appellant's Reply Brief, Appellant also argues that the State's interest in protecting the "privacy" of a depicted person from the posting of private photos that depict sexually explicit images or intimate body parts is "not compelling, but rather dubious[,]" reasoning that the State does not make it a crime to reveal other types of "private" information such as medical status, medical information, love letters, marital affairs, or credit history. Appellant argues this implicates a "red flag" of "underinclusivity." We need not decide whether the statute could be "underinclusive," because even if a statute is hypothetically underinclusive because it does not address all types of conduct that might produce the same evil to which the statute is directed, it does not make the statute unconstitutional or mean the

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[24] *Johnson*, 475 S.W.3d at 865 (quoting *N.Y. State Club Ass'n*, 487 U.S. at 14).

State's interest is not compelling.[25] We reject Lopez's argument because the same general criticism could be indiscriminately made about a host of other criminal statutes. For example, we note that the disclosure of medical information, bank records, Social Security numbers and possibly other personal information is addressed by other longstanding laws, none of which to our knowledge has been struck down by courts under a First Amendment overbreadth analysis and all of which, under the flawed reasoning used by Lopez might be accused of being "underinclusive."[26]

For the reasons outlined herein, we conclude that Lopez has failed to establish that the alleged overbreadth of the statute is "*substantial*, not only in an absolute

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[25] *See State v. Hodges*, 92 S.W.3d 489, 496-97 (Tex. 2002) ("Moreover, a statute does not fail merely because it is underinclusive and does not eliminate all types of conduct that could produce the same evil to which the statute is directed.") (citing *Clements v. Fashing*, 457 U.S. 957, 969-70 (1982) ("The State 'need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.'")); *see also Burson v. Freeman*, 504 U.S. 191, 207 (1992).

[26] *See, e.g.*, 15 U.S.C. § 6802(b) (financial institutions are prohibited from disclosing to third parties nonpublic, personal information about their customers without first giving the customers a chance to "opt out"); 42 U.S.C. § 408(a)(8) (nonconsensual disclosure of an individual's Social Security number can subject the discloser to fines and imprisonment for up to five years); 42 U.S.C. § 1320d-6 (persons who disclose individually identifiable health information without permission may be subject to a $50,000 fine and a term of imprisonment for up to a year).

sense, but also relative to the statute's plainly legitimate sweep."[27] We find that the language in section 21.16(b) does not prohibit a substantial amount of protected expression, and the danger identified by Lopez that the statute could possibly be unconstitutionally applied is unrealistic and based merely on one "fanciful hypothetical."[28] The threat of an arguably impermissible application of the statute to a grandmother who takes a picture of her grandchild would amount to no more than a "tiny fraction" of what is encompassed within the statute's plainly legitimate sweep.[29] We fail to see how the statute before us poses a threat to the "free and robust debate of public issues[,]" nor does it "interfere[] with a meaningful dialogue of ideas[,]" the core concern of the First Amendment.[30] The nonconsensual intentional disclosure of private visual material of another person's intimate parts or of another person engaged in sexual conduct as defined in section 21.16 would be of "such slight social value as a step to truth that any benefit that may be derived from them

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[27] *United States v. Williams*, 553 U.S. 285, 292 (2008).

[28] *See Johnson*, 475 S.W.3d at 865.

[29] *See Ferber*, 458 U.S. at 773.

[30] *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) (quotations omitted)); *see also San Diego v. Roe*, 543 U.S. 77, 84 (2004) (in the context of a government employer regulating the speech of its employees, the employer was not infringing upon the employees First Amendment rights when the employer terminated an employee for making and selling videos of the employee engaging in sexually explicit acts because the videos were not matters of public concern).

is clearly outweighed by the social interest in order and morality."[31] The statute's arguable overbreadth, if any, is insubstantial when judged in relation to the statute's plainly legitimate sweep.[32]

We have an obligation to construe statutes narrowly to avoid constitutional infirmities where possible.[33] In this context, applying a narrow construction to the statute, we conclude that the language used by the Legislature is not facially unconstitutional. The language selected by the Legislature limits the statute to the intentional and nonconsensual disclosure of sexually explicit images that the victim expected would remain personal and private.[34] The statute also defines the terms "intimate parts," "promote," "sexual conduct," "simulated," and "visual material."[35] The Legislature has narrowly defined the type of conduct that is prohibited and limited it to matters that were intended to be private and are not of public concern. Given this narrowing construction, as well as the express limitations on the statute's reach built into the statute, we conclude that it is narrowly tailored to advance the State's compelling interest.

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[31] *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

[32] *See Dun & Bradstreet, Inc.*, 472 U.S. at 756-57 (discussing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

[33] *Long v. State,* 931 S.W.2d 285, 295 (Tex. Crim. App. 1996).

[34] Tex. Penal Code Ann. § 21.16(b)(1).

[35] *Id.* § 21.16(a)(1)-(5).

The scope of section 21.16 is further narrowed by the requirement that the disclosure of the visual material must "cause[] harm" to the depicted person and reveal the identity of the depicted person.[36] Furthermore, section 21.16(b)(1) requires that the defendant must "intentionally" disclose the visual material.[37] The statute also expressly includes certain affirmative defenses. Thus, it would not apply to unintentional disclosures, voluntary exposures in a public or commercial setting, and certain other lawful disclosures as outlined in the statute.[38]

Even assuming without deciding that strict scrutiny review should be applied to the provision at issue, strict scrutiny requires only that a content-based restriction "be narrowly tailored, not that it be 'perfectly tailored.'"[39] While the statute in question may not be perfect, we conclude that the statute is narrowly tailored to achieve the State's compelling interest.[40] We overrule issue one.

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[36] *Id.* § 21.16(b)(3).

[37] *Id.* § 21.16(b)(1).

[38] *Id.* § 21.16(f).

[39] *See Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1671 (2015) (quoting *Burson*, 504 U.S. at 209).

[40] We note that in *Ex parte Jones*, No. 12-17-00346-CR, 2018 Tex. App. LEXIS 3439, at **11-16 (Tex. App.—Tyler May 16, 2018, pet. granted), a case currently on review by the Texas Court of Criminal Appeals, the Tyler Court of Appeals reached a different result. The Tyler Court held that section 21.16(b) is an invalid content-based restriction in violation of the First Amendment because it does not use the least restrictive means of achieving "the compelling government interest of preventing the intolerable invasion of a substantial privacy interest," and is overbroad. *Id.* at **13-14. For the reasons explained herein, after carefully

In his second issue, Lopez contends the trial court erred in denying relief because section 21.16 is unconstitutionally vague in violation of the Fourteenth Amendment. "A statute may be challenged as unduly vague, in violation of the Due Process Clause of the Fourteenth Amendment, if it does not: (1) give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) establish definite guidelines for law enforcement."[41]

According to Lopez, "[s]ection 21.16 is unconstitutionally vague and incapable of being made valid as written[]" because the term "disclose" is not defined by the statute. Lopez argues the following:

> Here, the government has taken advantage of an inherently vague statute to prosecute Appellant for an alleged act that was not illegal at the time it was alleged to have occurred. [] Despite the lack of any "continuous" language in the statute itself, the government has proceeded to prosecute Appellant based on the lack of a statutory definition of the word "disclose." However, as mentioned *supra*, the act of making the image public would constitute "disclosure" under its plain meaning. Furthermore, the law is well-settled in the civil context that Texas follows the "single publication" rule. [] The rational[e] being that on the date of distribution, the publisher, editor, and author have done all they can to relinquish control, title, and interest in the printed matter. [] The rule also provides for certainty regarding the limitations tolling date. [] No such certainty was afforded Appellant.

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examining the issues raised by Lopez, we reach a different result than the court did in *Jones*.

[41] *Scott v. State*, 322 S.W.3d 662, 665 n.2 (Tex. Crim. App. 2010) (citing *Bynum v. State*, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989)).

(citations omitted). We conclude that Lopez's argument in his second issue is an as-applied challenge to the statute. An as-applied challenge depends upon the particular facts and circumstances of the case.[42] "[P]retrial habeas is generally not available to test the sufficiency of the charging instrument or to construe the meaning and application of the statute defining the offense charged."[43] A pretrial writ of habeas corpus may not be used to address an as-applied challenge because it is not ripe for review, and "pretrial habeas is unavailable 'when the resolution of a claim may be aided by the development of a record at trial.'"[44] Therefore, we overrule his second issue.

In his third issue, Lopez argues that "[t]his case may not be properly before this or any court, as prosecution for this offense is time-barred by the statute of limitations and barred by Appellant's right to be free from Ex Post Facto prosecution." Lopez states in his appellate brief that he "may not have standing" to

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[42] *See, e.g.*, *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011).

[43] *Ex parte Perry*, 483 S.W.3d at 895 (citing *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010)).

[44] *Id.* (quoting *Ex parte Doster*, 303 S.W.3d 720, 724 (Tex. Crim. App. 2010)); *see also Fine*, 330 S.W.3d at 910; *Weise v. State*, 55 S.W.3d 617, 620-21 (Tex. Crim. App. 2001); *Ex parte Cross*, 69 S.W.3d 810, 815 (Tex. App.—El Paso 2002, pet. ref'd).

challenge section 21.16 because the State cannot prosecute him due to the United States and Texas Constitutions' bar against ex post facto laws and bills of attainder.[45]

Lopez argues that he posted the picture at issue on social media in 2014, and therefore the act of "disclosing" or "posting" occurred in 2014, and that section 21.16 was not passed by the Texas Legislature until April 14, 2015, and it did not take effect until September 1, 2015. Accordingly, his third issue asserting the charges are barred under limitations or as an ex post facto application also constitutes an as-applied challenge.

An ex post facto argument is an as-applied constitutional challenge that cannot be raised in a pretrial application for a writ of habeas corpus and should be litigated in the trial court and reviewed on direct appeal.[46] Lopez's ex post facto and limitations arguments are dependent on the construction of the word "discloses" as

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[45] We note that Lopez argues in his reply brief that the State has "admit[ted] an ex post facto violation" because it "stipulated" to certain dates in its chronology of the case in its appellate brief. On appeal, the State included in its appellate brief a summary of alleged facts of what it "expect[ed] the evidence will show at trial[.]" Lopez cites no authority, nor are we aware of any, supporting his argument that a statement of an expectation of what the evidence may show constitutes a stipulation or admission of an ex post facto violation. Furthermore, no written or oral stipulation of facts or evidence is included in the appellate record.

[46] *Ex parte Evans*, 410 S.W.3d 481, 485 n.10 (Tex. App.—Fort Worth 2013, pet. ref'd); *Ex parte Howard*, 191 S.W.3d 201, 203 (Tex. App.—San Antonio 2005, no pet.); *Ex parte Woodall*, 154 S.W.3d 698, 701 (Tex. App.—El Paso 2004, pet. ref'd).

applied to him, and as stated above, pretrial habeas is generally not available to test the sufficiency of the charging instrument or to construe the meaning and application of the statute defining the offense charged.[47] Accordingly, we overrule issue three.

The trial court's order is affirmed.

AFFIRMED.

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LEANNE JOHNSON
Justice

Submitted on March 14, 2018
Opinion Delivered March 27, 2019
Do Not Publish

Before McKeithen, C.J., Horton and Johnson, JJ.

[47] *Ex parte Perry*, 483 S.W.3d at 895 (citing *Ex parte Ellis*, 309 S.W.3d at 79).