COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

CASE NO.

05-15-00355-CR

EX PARTE XXXX WAYNE XXXX

APPEAL FROM THE 416th JUDICIAL DISTRICT COURT
COLLIN COUNTY, TEXAS

BRIEF OF DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

XXXX Wayne XXXX was charged by indictment returned on February 15, 2015 with four counts of knowingly inducing E.D. to engage in sexual conduct or sexual performance in violation of Tex. Penal Code § 43.25 . CR at 94-95[1]

Mr. XXXX filed a Pretrial Writ of Habeas Corpus to Declare Tex. Penal Code § 43.25 Unconstitutional. *Id*. at 99-109. The Writ was denied on February 26, 2015. *Id*. at 145. Mr. XXXX filed a Notice of Appeal from that denial on March 2, 2015. *Id*. at 150-51. The trial court entered its Certification of Mr. XXXX's right to appeal on March 25, 2015. *Id*. at 255.

[1]References to the Clerk's Record ("CR") refer to the page number.

STATEMENT REGARDING ORAL ARGUMENT

Mr. XXXX submits that oral argument is imperative in this case. This case involves complex First Amendment analysis relating to the constitutional validity of a criminal statute. Consequently, it requires the Court to analyze the applicability of the statute to a myriad of circumstances. Moreover, the analysis requires careful consideration of two recent Court of Criminal Appeals' cases[2] as well as two relatively recent United States Supreme Court cases.[3] In sum, this is the exact type of case that would benefit from a full discussion at an oral argument.

[2] *Ex Parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013) and *Ex Parte Thompson*, 442 S.W.2d 325 (Tex. Crim. App. 2014).

[3] *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002) and *United States v. Stevens*, 559 U.S. 460 (2010).

ISSUE PRESENTED

Whether Tex. Penal Code § 43.25 is facially unconstitutional under the First Amendment to the United States Constitution.

STATEMENT OF FACTS

Because this appeal relates to a facial challenged to Tex. Penal Code § 43.25, the underlying facts of the case are "irrelevant." *Ex Parte Lo*, 424 S.W.3d at 14, n.2. Nevertheless, to put the case in context, Mr. XXXX offers this brief factual recitation based on the discovery provided in the case.

The Complainant, E.D., alleges that she and Mr. XXXX had a consensual relationship that involved "sexual contact" (without actual sexual intercourse) at a time when she was seventeen years of age and Mr. XXXX was forty-three years of age. While unseemly, the parties appear to agree that it is perfectly permissible under Texas law for a forty-three year old to have a sexual relationship with a seventeen year old.

Nevertheless, after authorities determined they could not charge Mr. XXXX with any type of sexual assault, they learned that, when Mr. XXXX would travel to Asia on business, he and Ms. Dalley would "skype" (a video phone call over the internet). During some of those "skype sessions" it is alleged that Ms. Dalley would masturbate herself. These sessions were not recorded by either Mr. XXXX or Ms. Dalley and were private between the two of them.

SUMMARY OF THE ARGUMENT

Tex. Penal Code § 43.25 criminalizes using persuasion to "induce" (or in the case of a parent simply "authorizing") a person under the age of eighteen to engage in sexual conduct or a sexual performance. Because the use of persuasion to induce an action is frequently accompanied by speech, it implicates First Amendment concerns. Moreover, because § 43.25 only punishes the type of speech that induces sexual type behavior (either by conduct or by performance), its regulation of speech is "content-based." When content based speech is restricted, it is subject to strict scrutiny and the burden rests on the State to prove its constitutionality.

With regard to the inducement or authorization of sexual conduct, § 43.25 prohibits inducing a great deal of *legal* sexual behavior. For example, the statute criminalizes a parent from authorizing a child under eighteen from masturbating or engaging in sexual conduct with their girlfriend/boyfriend. Also, while it is perfectly legal for a seventeen year old to engage in sexual relations, the statute punishes inducing that seventeen year old from engaging in those very same relations. In the end, it is difficult to articulate a rule consistent with the First Amendment that punishes an individual for inducing activity that is not actually "lawless action." Moreover, the Court of Criminal Appeals has made clear that a statute that regulates speech on the basis of content must be necessary and "narrowly drawn" to serve a

compelling state interest. Here, although the State could have enacted a statute that simply prohibited inducing one to engage in conduct with an individual that would constitute a violation of Texas Penal Code §§ 21.11, 22.011, or 22.021, it did not do so. Instead, it enacted a broad statute that prohibits a person or parent from persuading or authorizing another to engage in what may be perfectly legal acts.

With regard to inducing a sexual performance, the United States Supreme Court has recently made clear that for child pornography to be illegal it must be intrinsically intertwined with the underlying commission of a crime such as the sexual assault of a child. In Texas, of course, it is not a crime for seventeen year olds to engage in otherwise legal sexual performances. Consequently, the First Amendment prohibits criminalizing the inducement of a non-obscene sexual performance because there is no "proximate link" to a crime from which the proscribed performance comes.

In sum, Texas Penal Code § 43.25 is not one of the rare statutes that can survive the strict constitutional scrutiny under the First Amendment to the United States Constitution that must be given to criminal statutes that attempt to regulate content-based speech.

ARGUMENT

I. THE STATUTE AT ISSUE

A. Elements

Tex. Penal Code § 43.25 makes it a third degree felony when a person, knowing the character and content thereof, employs, authorizes, or induces a child younger than 18 years of age to engage in sexual conduct or a sexual performance. The elements that must be proven to establish a violation of the statute are as follows:

1. A PERSON

2. KNOWING THE CHARACTER AND CONTENT OF THE SEXUAL CONDUCT *OR* SEXUAL PERFORMANCE

3. EMPLOYS, AUTHORIZES, OR INDUCES A CHILD UNDER 18 YEARS OF AGE

4. TO ENGAGE IN SEXUAL CONDUCT OR PERFORMANCE

B. Reach of the Statute

Case law holds that Tex. Penal Code § 43.25 reaches authorizing or inducing either "sexual conduct" *or* "a sexual performance." *See, e.g., Summers v. State,* 845 S.W.2d 440, 442 (Tex. App.–Eastland 1992). For purposes of proving **"inducement"** under § 43.25, case law holds that it is enough to show that a defendant has used "persuasion" to produce sexual conduct. *See, Scott v. Texas*, 173 S.W.3d 856, 862

(Tex. App. -Texarkana 2005), *rev'd on other grounds*, 235 S.W.3d 255 (Tex. Crim. App. 2007). Indeed, Similarly, "Black's Law Dictionary defines 'inducement' as '[t]he act or process of enticing or persuading another to take a certain course of action.'" *Id*. *citing*, Black's Law Dictionary 790 (8th Ed. 2004).

Moreover, according to case law, this statute also covers parents who **authorize**[4] or induce "sexual conduct" or a sexual performance by their own children. *Melder v. State*, 2014 WL 1922570 (Tex. App. – Tyler, May 14, 2014).[5]

Of course, most of what Tex. Penal Code § 43.25 criminalizes is actually prohibited by other statutes. For example, Tex. Penal Code § 22.011 prohibits a person from engaging in most forms of sexual conduct with a child under the age of seventeen. Tex. Penal Code § 21.11 prohibits a person from having sexual contact with a child under the age of seventeen. Tex. Penal Code § 15.031 prohibits a person from attempting to induce any other person to engage in felonious behavior. Tex. Penal Code § 15.031 prohibits a person from requesting, commanding or attempting

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[4]"Authorize" is typically defined as, *inter. alia*, "to give authority for, approve, sanction, confirm." *State v. Blankenship*, 146 S.W.3d 218, 220, n.6 (Tex. Crim. App. 2004).

[5]"The legislature did not include 'sexual conduct' in that sentence. The logical extension of Appellant's argument would mean that parents cannot be criminally responsible under the statute for authorizing, employing, or inducing their own child to engage in sexual conduct that does not meet the definition of a sexual performance. We conclude, however, that the legislature did not intend this result." *Melder*, 2014 WL 1922570 at * 3.

to induce a "minor" to engage in sexual conduct or contact.

C. Examples of Conduct Prohibited by Tex. Penal Code § 43.25

1. Example 1

A Mother learns that her sixteen year old daughter is having sex with her sixteen year old boyfriend. Concerned that she practice safe sex, the mother tells her daughter that, although, in a perfect world her daughter would "wait," she is okay with her daughter having sex with her boyfriend as long as she uses birth control. The mother then takes her daughter to the doctor to be prescribed birth control pills. The mother has knowingly authorized (*i.e.* approved and/or sanctioned) her daughter to engage in sexual conduct and has violated § 43.25.

2. Example 2

A Father talks to his son about sex. He tells his son that masturbation is natural and that he has no problem with his son masturbating in his bedroom and would prefer that his son do that than have premarital sex. The father has knowingly authorized (*i.e.* approved and/or sanctioned) his son to engage in sexual conduct and has violated § 43.25.

3. Example 3

Joe, a twenty year old male, and his friends attend Mardi Gras in Galveston. Joe shouts at a woman to "show us your breasts" and the woman flashes the group.

Unbeknownst to Joe, the woman turns out to be a few weeks shy of her eighteenth birthday. Joe has knowingly induced (*i.e.* persuaded) sexual conduct and has violated § 43.25.

4. Example 4

Tim, a Sophomore at the University of North Texas who turned twenty years old the week before, is dating and sexually involved with Lisa, a seventeen year old Freshman. Lisa does not really feel like having sex one night, but Tim talks her into it by saying it will help relieve the "stress" of exams. Tim has induced (*i.e.* persuaded) Lisa to engage in sexual conduct and has violated § 43.25

5. Example 5

Stan, a twenty year old soldier is being shipped out to Iraq. He and Jill, who is two years and five days younger than Stan, have dated since they were in junior high and are engaged to be married when he returns from Iraq. The couple is not sexually active and have vowed to wait to go "all the way" until their wedding night. Before being deployed, Stan asks Jill to give him some "naughty pictures" to take with him to Iraq. Jill takes a selfie while topless. Stan has induced (*i.e.* persuaded) Jill to engage in a sexual performance and has violated §43.25.

II. TEX. PENAL CODE § 43.25 IS FACIALLY UNCONSTITUTIONAL

A. First Amendment Facial Challenges to Criminal Statutes

The two recent Texas Court of Criminal Appeals cases that are relevant to the instant analysis are *Ex Parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013) and *Ex Parte Thompson*, 442 S.W.3d 325 (2014). *Lo* held a portion of Texas's online solicitation of a minor statute unconstitutional under the First Amendment to the United States Constitution and *Thompson* held Texas's improper photography statute unconstitutional under the First Amendment.

As the Court of Criminal Appeals explained in *Lo*:

> [W]hen the government seeks to restrict and punish speech based on its content, the usual presumption of constitutionality is reversed. Content-based regulations (those laws that distinguish favored from disfavored speech based on the ideas expressed) are presumptively invalid, and the government bears the burden to rebut that presumption. The Supreme Court applies the "most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."

* * * *

To satisfy strict scrutiny, a law that regulates speech must be (1)

> necessary to serve (2) compelling state interest and (3) narrowly drawn. A law is narrowly drawn if it employs the least restrictive means to achieve its goal and if there is a close nexus between the government's compelling interest and the restriction. If a less restrictive means of meeting the compelling interest could be at least as effective in achieving the legitimate purpose that the statute was enacted to serve, then the law in question does not satisfy strict scrutiny. Furthermore, when the content of speech is the crime, scrutiny is strict because, "as a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

Lo, 424 S.W.3d at 15-16 (citations and footnotes omitted). *See also Thompson*, 442 S.W. 3d at 344-347. "It is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 818 (2000).

1. § 43.25 Punishes "Speech"

The State argues below that "inducement' is not synonymous with "speech" and, therefore, any effect § 43.25 might have on speech is "merely incidental." *See* CR at 133-45. Common sense and case law renders that argument unavailing.

As noted above, for purposes of proving "inducement" under § 43.25, it is enough to show that a defendant has used "persuasion" to produce sexual conduct. Meanwhile Merriam-Webster's Dictionary defines "persuade" as "to cause (someone) to do something by asking, arguing, or giving reasons." Thus it would appear common sensical to conclude that a large part of what § 43.25 is, in fact, speech.

Moreover, contrary to the State's apparent argument, the First Amendment does not only cover statutes that use the word "speech" or a perfect synonym of the word "speech." For example, in *City of Houston, Tex. v. Hill*, 482 U.S. 451, 466 (1987) the United States Supreme Court overturned, on First Amendment grounds, a municipal ordinance making it unlawful to "interrupt" police officers in performance of duties because it "criminalizes a substantial amount of constitutionally protected speech." In *Loper v. New York City Police Dept.* 999 F.2d 699, 704 (2nd Cir. 1993) the United States Court of Appeals for the Second Circuit found that a statute prohibiting loitering for the purpose of "begging" to be violative of the First Amendment because "[b]egging frequently is accompanied by speech." In *State v. Melchert-Dinkel*, 844 N.W. 2d 13 (Minn. 2014), a case discussed below, the Minnesota Supreme Court recently found that a portion of a state statute which proscribed the "advising or encouraging" another to commit suicide violated the First Amendment.

Clearly, the use of persuasion to induce an action "frequently is accompanied by speech. *Loper,* 999 F.2d at 704. Moreover, "inducing" is certainly no more divorced from "speech," than the ordinances/statutes dealing with "interrupting," or "begging" or "encouraging" that are discussed above. Thus, the State's argument that a First Amendment analysis is inappropriate because "inducement" is "not synonymous" with "speech" is without merit.[6]

2. § 43.25 Punishes the "Content of the Speech"

As noted by the Court of Criminal Appeals in *Lo*, "[i]f it is necessary to look at the content of the speech in question to decide if the speaker violated the law, then the regulation is content-based." *Lo*, 424 S.W.3d at 15 n. 1. There the Court held that prohibiting an adult from communicating with a minor via the internet is content-neutral, but a statute that prohibits an adult from communicating with a minor via the internet in a sexually explicit manner *is* content-based. Similarly, in *Thompson*, the Court of Criminal Appeals observed:

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[6]The State also argued that statute "does not deal with any kind of speech or communication, but is [sic.] rather [sic.] conduct based." *See* CR at 134. The State compares § 43.25 to the "solicitation of a minor" portion of Tex. Penal Code § 33.021 which the Court of Criminal Appeals *upheld* in *Lo*. What the State misses, however, is that *Lo* and the myriad of cases that uphold such solicitation statutes note that those statutes are not unconstitutional because it is the "requesting a minor to engage *in illegal sexual acts* that is the gravamen of the offense." *Lo*, 424 S.W.3d at 17 (emphasis added). Here, as explained below, § 43.25 goes far beyond the inducement to commit illegal sexual acts and, instead, punishes the inducement of perfectly legal acts.

> [T]he statutory provision at issue does not penalize all non-consensual acts of taking photographs and making visual recordings. A statute that did so would be content neutral, but it is doubtful that such a broad prohibition would satisfy intermediate scrutiny. The provision at issue here penalizes only a subset of non-consensual image and video producing activity- that which is done with the intent to arouse or gratify sexual desire. We find this discrimination to be content based

Thompson, 442 S.W2d at 347.

Here, there can be little debate that § 43.25 is a content based law because it only punishes the type of speech that induces sexual type behavior (either by conduct or by performance).[7] This is no different than *Thompson*, where the speech was held to be content based where it was "done with the intent to arouse or gratify sexual desire."

3. Conclusion

When content based speech is restricted it is subject to strict scrutiny and the burden rests squarely on the State to prove its constitutionality. *Lo*, 424 S.W.3d at 15-16. Moreover, as discussed below, § 43.25 is not one of the "rare" statutes that can survive strict constitutional scrutiny.

B. Inducing Sexual Conduct

It is first helpful to review a 2014 out-of-state case that demonstrates the

[7]For example, it punishes a father who explicitly tells his son it is okay for a son to masturbate in his room but does not punish a father who explicitly forbids a son from masturbating in his room.

constitutional issue with criminalizing the inducement of non-criminal behavior. At issue in *Melchert-Dinkel*, 844 N.W. 2d 13 was Minnesota's statute, a portion of which proscribed the "advising or encouraging" (*i.e.* inducing or persuading) another to commit suicide. A unanimous Minnesota Supreme Court found this portion of the statute to be an unconstitutional infringement on the First Amendment despite the disturbing facts of the case where the defendant was "an online predator who was encouraging people to commit suicide by hanging." *Id*. at 17. The Minnesota Supreme Court first found that the statute punished "content-based" speech. *Id*. 18-19. It next rejected the State's argument that the statute proscribed "speech that falls under the 'speech integral to criminal conduct' exception to the First Amendment." *Id.* at 19.

> [T]he Supreme Court has never recognized an exception to the First Amendment for speech that is integral to merely harmful conduct, as opposed to illegal conduct.
>
> * * * *
>
> [T]he obvious problem is that suicide is no longer a criminal act in any jurisdiction relevant to this matter. *It is difficult to articulate a rule consistent with the First Amendment that punishes an individual for "inciting" activity that is not actually "lawless action."* Thus, the State's argument fails because suicide is not unlawful and cannot be considered "lawless action."

Id. at 20-21 (emphasis added).[8] Similarly, in regard to the statute at issue in the instant case, "the obvious problem" is that encouraging another to engage in "sexual conduct" that is not necessarily in itself illegal is as offensive to the First Amendment as encouraging another to commit suicide in a state where suicide is not illegal.

Another interesting out-of-state case is *State v. Tusek*, 630 P.2d 892 (Or. App. 1981) holding that an Oregon statute proscribing accosting a person for deviate purposes was unconstitutional on its face as violative of the First Amendment. The statute was designed by the Oregon legislature to prevent aggressive solicitation by homosexuals and prohibited a person from requesting another person to engage in deviate sexual intercourse while in a public place. *Id*. at 892-93. In declaring the statute unconstitutional, the Oregon Court zoned in on the problem: "The statute as it now stands thus makes it a crime to ask another person to participate in an act which is not itself a crime." *Id*. at 894.

> We find ourselves in agreement with the courts in Virginia and Maryland, which noted:

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[8] *See also Melchert-Dinkel*, 844 N.W. 2d at 20 ("The State urges us to hold, as did the court of appeals, that the 'speech integral to criminal conduct' exception applies here because speech that intentionally advises, encourages, or assists another in committing suicide 'is an integral part of the criminal conduct of physically assisting suicide.' But the statute, on its face, does not require a person to physically assist the suicide.").

Likewise, § 43.25 requires only that a defendant knowingly induce sexual conduct involving a person under eighteen. It does *not* require the defendant to be the one to participate in the sexual conduct.

> "It would be illogical and untenable to make solicitation of a noncriminal act a criminal offense." *Pedersen v. City of Richmond, supra*, 254 S.E.2d at 98,
>
> "(I)t would be anomalous to punish someone for soliciting another to commit an act which is not itself a crime * * *." *Cherry v. State, supra*, 306 A.2d at 640.

Tusek, 630 P.2d at 894-95. Again, that is exactly what § 43.25 does. § 43.25 makes it a crime to request another to engage in "sexual conduct" which is not necessarily itself a crime.[9]

Turning to the two recent Texas cases. *Lo* dealt with Texas Penal Code § 33.021(b) which prohibited a person from online communications with a person *under seventeen years of age* for the purpose of sexual gratification. *Lo*, 424 S.W.3d 17. A unanimous Court of Criminal Appeals noted that this subsection of the statute "most assuredly" regulated the content of speech. *Id*. at 25. It likewise unanimously held that the State could not satisfy its heaving burden of showing the portion of the statute being challenged did not violate the First Amendment. *Id*. at 18. ("The State may not justify restrictions on constitutionally *protected* speech on the basis that such restrictions are necessary to effectively suppress constitutionally *unprotected* speech...." (emphasis in original)).

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[9]For example, it is not a crime for a person of any age to masturbate nor is it a crime in Texas for an adult to have sexual relations with a seventeen years old or older.

The Court of Criminal Appeals in *Lo* contains two discussions which undoubtedly informs the analysis of the instant statute. First, as noted above, it held that a non-challenged portion of the statue which proscribed using the computer to actually solicit a person *under seventeen years old* to engage in sexual contact was not unconstitutional because the prohibition was " designed to induce a minor to commit an *illegal* sex act" (*i.e.* sexual contact between an adult and a minor). *Id*. at 26 (emphasis added). In contrast, § 43.25 prohibits the inducement of *legal* sex acts. Second, the *Lo* Court discussed the concept of preventing the "grooming" of children which is exactly what the State apparently contends Mr. XXXX did to Ms. Dalley.

> But even if the Legislature did have an intent to prohibit "grooming" in subsection (b), the culpable mental state prescribed in that provision- "intent to arouse or gratify the sexual desire of any person"- is not narrowly drawn to achieve that end. A more narrowly drawn culpable mental state would be "with intent to induce the child to engage in conduct with the actor or another individual that would constitute a violation of §§ 21.11, 22.011, or 22.021." The State suggests that, without the current provision, perverts will be free to bombard our children with salacious emails and text messages, and parents and law enforcement would be unable to stop it. But as we have just observed, there are more narrow means of drawing a statute to target the phenomenon of "grooming."

Id. at 23-24 (footnote omitted). Likewise, § 43.25 could have simply prohibited inducing one to engage in conduct with an individual that would constitute a violation

of §§ 21.11, 22.011, or 22.021," but was not so narrowly drawn.[10]

While *Thompson* is of less value to the instant analysis because it involves the taking of "improper" photographs, the Court of Criminal Appeals made clear in *Thompson* that "a law 'is not susceptible to a narrowing construction when its meaning is unambiguous.'" *Thompson*, 442 SW.3d at 339 (citation omitted). With regard to the inducing of sexual conduct, it is clear that § 43.25 prohibits a person from using speech to persuade another to engage in a variety of conduct that is completely legal under Texas law. As such, it is not narrowly drawn and, consequently, violates the First Amendment to the United States Constitution.

C. Inducing a Sexual Performance[11]

The United States Supreme Court case of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) and especially the 2010 case of *United States v. Stevens*, 559 U.S. 460 (2010) show why the portion of § 43.25 prohibiting the persuading of a

[10]Indeed, just as in *Lo*, § 43.25 is not narrowly drawn to achieve only the goal of protecting children from sexual predators. The *Lo* Court noted that the challenged portion of the statute in that case would "apply to a Texas defendant who has 'titillating talk' with a child in Outer Mongolia or a Mongolian who has salacious communications with a child in Dallas" and thus did not only protect a child from a person from soliciting a minor "for unlawful activity." *Id*. at 26. Here also, § 43.25 would make it a crime for a person in Dallas to use speech to persuade a person under eighteen years old living in Outer Mongolia to masturbate.

[11]Mr. XXXX submits that the "sexual conduct" portion of § 43.25 is not readily severable from the "sexual performance" provision. Therefore, he submits that it is unnecessary for the Court to analyze the "sexual performance" provision of the statute if it finds that the "sexual conduct" portion is overbroad.

seventeen year old to engage in a sexual performance also violates the First Amendment to the United States Constitution and renders that portion of the statute overbroad on that basis as well.

Until *Ashcroft* and *Stevens*, most courts had interpreted the Supreme Court's decision in *New York v. Ferber*, 458 US. 759 (1982) to create a categorical exclusion for child pornography from any First Amendment protection. Nevertheless, *Ashcroft* and *Stevens* have since made clear that the *Ferber* holding was not that broad.

In *Ashcroft*, for example, the Court wrote:

> *Ferbe*r upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were "intrinsically related" to the sexual abuse of children in two ways. *Id.*, at 759, 102 S.Ct. 3348. First, as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being. *See Id.*, at 759, and n. 10, 102 S.Ct. 3348. Second, because the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network. "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Id.*, at 760, 102 S.Ct. 3348. *Under either rationale, the speech had what the Court in effect held was a proximate link to the crime from which it came.*

Ashcroft, 535 U.S. at 249-50 (emphasis added). The *Ashcroft* Court, which found a statute prohibiting virtual pornography to violate the First Amendment, also seemed to point out the oddity of proscribing visual depictions of persons engaged in sexual

activity who appear to be under the age of eighteen because, in many instances, the activity could be consensually legal. *Id.* at 247.

More recently, in *Stevens*, the Court further noted that "[o]ur decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens,* 559 U.S. at 472. It explained:

> We made clear that *Ferber* presented a special case: The market for child pornography was "intrinsically related" to the underlying abuse, and was therefore "an integral part of the production of such materials, an activity illegal throughout the Nation." *Id.*, at 759, 761, 102 S.Ct. 3348.

Id. at 471.

In short, *Ferber* presented a case in which the market for child pornography was related to the underlying offense of abusing children and *Ashcroft* and *Stevens* make clear that, for child pornography to be illegal, it must be intrinsically intertwined to the underlying commission of a crime.

> [W]here as before *Stevens* many believed- perhaps erroneously so- that any sexually explicit image of a minor was child pornography, the belief is now fatally flawed. Instead, in determine whether a particular non-obscene image constitutes child pornography, the initial question must be whether there is a *specific illegal conduct* to which the speech is integral."

Antonio Haynes*, The Age of Consent: When is Sexting No Longer "Speech Integral to Criminal Conduct?"* 97 Cornell L. Rev. 369 394-95 (2012) (emphasis added).

Absent this connection between the visual representation and the crime, First Amendment protection is presumed if an expressive activity is claimed. Carman Naso*, Sext Appeals: Reassessing the Exclusion of Self Created Images from First Amendment Protection*, 7 Crim. L. Brief 4, 11 (2011).

Consequently, the inducing sexual performance portion of § 43.25 must be examined in light of *Ashcroft* and *Stevens*. In this light, it is obviously overbroad. First, it prohibits consensual performances by seventeen year olds where the underlying activity is *not* illegal and, therefore, the statute is not protected by the Supreme Court's *Ferber* decision. In other word, there is no "proximate link" to a crime from which the proscribed performance comes. *Ashcroft*, 535 U.S. at 250. Second,§ 43.25 prohibits cases where there is no "permanent record" of the activity recorded. For example, in this case the "skype sessions" were private transmissions of legal activity that were not preserved.[12]

D. Conclusion

Mr. XXXX appreciates that the State has a compelling interest in protecting minors from unwanted sexual conduct. Nevertheless, § 43.25 is facially overbroad

[12]If, for example, the State was simply attempting to protect the reputational image of seventeen year olds under the belief that they can consent to sexual relations but must be protected from the possible reputational harm that a "permanent record" of a sexual performance creates, it could prohibit the creating of a permanent recording of the performance and/or prohibit the distribution of any recording of the performance.

and cannot withstand "strict scrutiny." As noted above, the State could have enacted a statute that simply prohibited inducing one to engage in conduct with an individual that would constitute a violation of §§ 21.11, 22.011, or 22.021, but it did not do so. Instead, it enacted a statute that, in part, prohibits a person or parent from persuading or authorizing another to engage in what may be perfectly legal acts. The examples set forth on pages 12-13 *supra*. give some examples of the broad reach of this statute and how it might impact the parent-child relationship.[13] Moreover, the instant case is but another example of the overbreadth of the statute where Mr. XXXX and Ms. Dalley had a right to engage in almost any sex act which their imaginations permitted, however, they could not masturbate while continents apart on Skype. *Pedersen v. City of Richmond*, 254 S.E.2d 95, 98 (1979) ("It would be illogical and untenable to make solicitation of a noncriminal act a criminal offense.")

[13]It is, of course, no answer the suggest that the State would simply not enforce the law in the type of parent-child scenarios described above. *See Hill*, 482 U.S. at 466-67 (An overbroad statute cannot be saved by giving the State discretion as to the situations in which it is enforced).

PRAYER

For the foregoing reasons, this Court should grant Mr. XXXX's Writ of Habeas Corpus, declare Tex. Penal Code § 43.25 unconstitutional and order that the indictment against Mr. XXXX be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, do hereby certify that, on this 1st day of May, 2015, I caused a copy of the foregoing document to be served by first class mail, postage prepaid, on the Collin County District Attorney's Office, 2100 Bloomdale Rd, Suite 100, McKinney, TX 75071.

/s/ F. Clinton Broden
F. Clinton Broden

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Tex. R. App. P.9.4 because this brief contains 5,349 words, excluding the parts of the brief exempted by the rule.

/s/ F. Clinton Broden
F. Clinton Broden