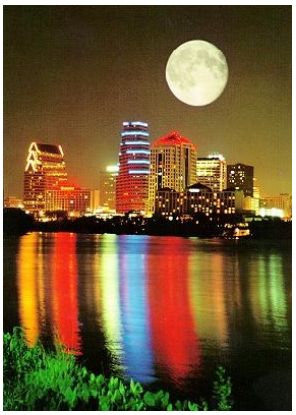

One Fabulous Skyline

TIBA TEXAS INDEPENDENT BAR ASSOCIATION

Post Office Box 783
Austin, Texas 78767
Tel. 512-354-7823
Fax: 512-532-6282

Web Site: www.texindbar.org

Vol. 25, No. 25 - July 3, 2017

Case Name: Ex parte Adam Wayne Ingram

- OFFENSE: Pre-Trial Habeas Corpus [Online Solicitation of a Minor]
- COUNTY: Bexar
- COURT OF APPEALS: San Antonio
- C/A CITATION: Unpublished
- C/A RESULT: Denial of Relief Affirmed
- CCA. CASE No. PD-0578-16 DATE OF OPINION: June 28, 2017
- DISPOSITION: Court of Appeals Affirmed
- OPINION: Presiding Judge Keller VOTE: 5-4-0
- TRIAL COURT: 186th D/C
- LAWYERS: Donald Flanary (Defense); Patrick Ballantyne (State); Lisa McMinn (SPA)

562 Post-Conviction Habeas Corpus / Cognizability: Appellant filed a pre-trial application for writ of habeas corpus claiming that Penal Code § 33.021 is unconstitutional for a variety of reasons.

Holding: We conclude that none of [Appellant's] complaints are cognizable in a pretrial habeas proceeding. *** Except when double jeopardy is involved, pretrial habeas is not available when the question presented, even if resolved in the defendant's favor, would not result in immediate release. Moreover, pretrial habeas is generally unavailable "when the resolution of a claim may be aided by the development of a record at trial." The only recognized exception to the general prohibition against record development on pretrial habeas is when the constitutional right at issue includes a right to avoid trial, such as the constitutional protection against double jeopardy. *** The "law applicable to the case" in a criminal prosecution always includes the elements of the charged offense, but there are other types of issues, such as a defense, that become law applicable to the case if raised by the evidence. *** It follows that an anti-defensive issue is not law applicable to the case at the pretrial habeas stage. That is a problem for Appellant because, even in the First Amendment context, a defendant has standing to challenge a statute only if it is being invoked against him. At this juncture, subsections (d)(2) and (d)(3) have not been invoked in Appellant's case, and, therefore, he cannot meet the basic standing requirement necessary to obtain relief. *** We conclude that Appellant's claims that revolve around the anti-defensive issues -- the mens rea, right to present a defense, and vagueness claims -- are not cognizable on pretrial habeas. We also conclude that Appellant's overbreadth and dormant commerce claims, to the extent that they depend on the anti-defensive issues, are not cognizable.

Concurring / Dissenting Opinions: Judge Alcala filed a concurring opinion, disagreeing with the majority opinion's analysis as to the non-cognizability of some of the claims in the pretrial habeas application. She would decide all of his claims on the merits. She would also find sustain Appellant's complaint that the online solicitation of a minor statute, as a whole, is unconstitutionally vague, but would "delete the portions of the offending subsection that render the statute unconstitutional, and, as narrowly constructed," and uphold the constitutionality of the statute.

(Mark W. Bennett) This is a results-oriented gutting of the First Amendment. In order to uphold a statue in the face of a constitutional challenge, the Court of Criminal Appeals plucked the concept of an "anti-defensive issue" from thin air. Before Ingram, no such thing existed. The potential mischief of this invention cannot be understated: The legislature could write a statute providing, "it is a felony to criticize a politician with intent to incite imminent lawless violence against him," and add an "anti-defensive issue" providing, "It is not a defense that the speaker did not intend to incite imminent violence." The net effect? "It is a felony to criticize a politician." The chilling effect of such a statute would be severe -- few people will risk criticizing a politician if they might become liable for a felony. Yet under the Court of Criminal Appeals' risible holding in Ingram a defendant would have to go through a trial or a guilty plea to challenge the statute as facially overbroad --- that is what the petitioner in Leax v. State, No. PD-0517-16 (see unpublished C/A opinion at 09-14-00452-CR). It will be interesting to see how the Court of Criminal Appeals extends Ingram's logic to uphold the conviction being challenged in Leax.

(David A. Schulman) I agree with Mark. No defendant should ever have to go through trial in a prosecution based on an unconstitutional statute or unconstitutional application of such statute. Additionally, I disagree with the idea that pre-trial habeas corpus is not available when it "would not result in immediate release." I think it is (and/or should be) available whenever it would block prosecution for the particular offense. Thus, the statement should be modified to say that pre-trial habeas corpus is available when it will result in the defendant's "immediate release" from confinement on the charged offense being challenged in the habeas corpus proceeding.

(John G. Jasuta) "Blind mother justice on a pile of manure " ("House Un-American Blues Activity Dream") © 1965; Richard Farina --- RIP

§§ 62 Challenges to Prosecution / Overbreadth: Appellant contends that Subsections (d)(2) and (d)(3) render the online solicitation statute unconstitutional for a variety of reasons. He claims that the provisions impermissibly negate the mens rea requirement of the statute in violation of the right to due process, deny a defendant his Sixth Amendment right to present a defense, help render the online solicitation statute unconstitutionally overbroad in violation of the First Amendment, and render the statute unconstitutionally vague under the Fifth and Fourteenth Amendments.

Holding: Appellant's overbreadth claim does not rely solely upon the anti-defensive issues, and to the extent it does not, it is cognizable. *** Appellant contends that the pre-2015 statute's definition of "minor" creates an overbreadth problem by allowing the criminal provisions of the online solicitation statute to apply to protected speech between adults. ***[Instead] of defining a "minor" as someone under age 17, the Legislature defined the term to mean either someone who represents himself or herself to be under age 17 or someone whom the actor believes to be under age 17. That means a person could commit a crime by soliciting someone who is actually an adult, as long as the person solicited had represented himself or herself to be under age 17 or the actor believed that the person being solicited was under age 17. We conclude, however, that solicitation still qualifies as an "integral part of conduct in violation of a valid criminal statute" if the actor is mentally culpable with respect to the solicited person's age, even if the solicited person turns out to be an adult. *** Turning

specifically to Appellant's complaint that the definition of "minor" allows the online solicitation statute to encompass roleplay about age between adults, we disagree. Such roleplay, as Appellant has described it, involves two or more adults mutually pretending that one or more of them is a child. Obviously, a defendant who believes that the complainant is a child (under age 17) is not engaged in a mutual game of pretend. A mutual game of pretend also does not occur when the complainant represents himself or herself to be a child, because, under our construction of the statute, the complainant would be asserting age as a matter of fact, to be accepted as true. *** When a statute that is designed to protect children against predatory practices proscribes mostly speech that is not protected by the First Amendment but incidentally encompasses unusual situations that are protected by the First Amendment, the correct approach is to uphold the statute against an overbreadth challenge and deal with the unusual situations on an "as applied" basis when they arise. We reject Appellant's contention that the definition of "minor" renders the online solicitation statute unconstitutionally overbroad.

Ed Note: Appellant also claimed that Penal Code § 33.021(c) impermissibly burdens interstate commerce in violation of the United States Supreme Court's "dormant Commerce Clause" jurisprudence. This complaint was raised in Ex parte Lo, 424 S.W.3d 10 (Tex.Cr.App. 2013)(see ☙, Vol. 21, No. 44; 11/04/2013), but the Court of Criminal Appeals did not address it. Nevertheless, since that time, at least seven different Courts of Appeals have considered and rejected it. In this case, the Court of Criminal Appeals also rejected the claim, holding that the federal case on which Appellant relies, American Library Association v. Pataki, 969 F. Supp. 160 (S.D.N.Y 1997), "is not binding precedent -- it is the decision of a federal trial court -- and it has received a significant amount of criticism for misunderstanding the nature of the internet and misconstruing dormant Commerce Clause jurisprudence." The Court concluded "that the three concerns expressed in Pataki are either unwarranted or inapplicable to the present case," and rejected the claim.