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COURT OF CRIMINAL APPEALS
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The State claims in its *Reply Brief*, "By any measure, this Court should hold that the court of appeals should not have reached overbreadth."

This is contrary to the State's position in the Court of Appeals:

> At the hearing, Appellant—relying on *Karenev v. State*, 258 S.W.3d 210 (Tex. App.—Fort Worth 2008), *rev'd*, 281 S.W.3d 428 (Tex. Crim. App. 2009)—argued that Section 42.07(a)(7) is unconstitutionally vague and overbroad on its face, and unconstitutional as applied to him. CR 1: 45–46 (Motion to Quash); RR 2: 5–8 (Motion to Quash Hearing).

State's Brief in the Fort Worth Court of Appeals at 2.

The State did not argue procedural default until it had lost on the merits. If the Court of Appeals erred in reaching the issue of overbreadth, it did so only at the State's invitation.

This Court reviews the "decisions" of the courts of appeals. Tex. R. App. Proc. 66.1. A party

> may not expect this Court to consider a ground for review that does not implicate a determination by the court of appeals of a point of error presented that court in orderly and timely fashion.

Tallant v. State, 742 S.W.2d 292, 294 (Tex. Crim. App. 1987) (citing *Degrate v. State,* 712 S.W.2d 755 (Tex. Crim. App. 1986)).

> This orderly and timely presentation is accomplished by requiring the parties to raise their points of error and the responses thereto in their original briefs to the courts of appeals.

Farrell v. State, 864 S.W.2d 501, 503 (Tex. Crim. App. 1993). The exception to this rule is a challenge to the jurisdiction of the court of appeals. *Riley v. State*, 825 S.W.2d 699 (Tex. Crim. App. 1992) (court of appeals must review challenge to jurisdiction raised for the first time in a motion for rehearing).

The State here does not challenge the jurisdiction of the court of appeals. It merely challenges the issues that the court below should have reached. Having invited the court below to decide those issues, it should not now be heard to argue that the court below erred in doing so.

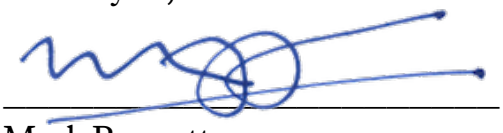
The State attempts to place the burden on Mr. Barton of showing that strict scrutiny is not met. This attempt must fail. When a law restricts speech based on its content, including on its purpose, it is presumed to be unconstitutional and the State must prove that it satisfies strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015); *see State v. Doyal*, _ S.W.3d _, 2019 WL 944022, No. PD-0254-18 at *17 (Tex. Crim. App. Feb. 27, 2019) (Slaughter, J., concurring) (describing rules for content-based regulations).

The Court of Appeals got the result right, but not the analysis. If the correct arguments were not made below, this Court's de novo review

may take into account the correct arguments in its review of the decision of the Court of Appeals.

For those reasons, please affirm the judgment of the Court of Appeals.

Thank you,



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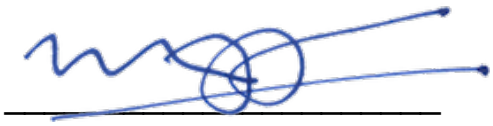
A copy of this motion was emailed to John R. Messinger, the Assistant State Prosecuting Attorney, on February 9, 2020, by the efiling system.



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