No. PD-1032-20 & PD-1033-20

In the Court of Criminal Appeals

ZENA COLLINS STEPHENS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition for Review from the First Court of Appeals, Cause No. 01-19-00209-CR & No. 01-19-00243-CR, Affirming in Part and Reversing in Part, District Court of Chambers County, 344th Judicial District
Cause No. 18-DCR-0152, Hon. Randy McDonald, Presiding.

BRIEF OF *AMICI CURIAE* SENATOR PAUL BETTENCOURT, SENATOR BRIAN BIRDWELL, SENATOR DAWN BUCKINGHAM, SENATOR DONNA CAMPBELL, SENATOR BRANDON CREIGHTON, SENATOR BOB HALL, SENATOR BRYAN HUGHES, SENATOR LOIS KOLKHORST, SENATOR JANE NELSON, SENATOR ANGELA PAXTON, SENATOR CHARLES PERRY, SENATOR CHARLES SCHWERTNER, SENATOR DREW SPRINGER, SENATOR LARRY TAYLOR

Counsel for *Amici Curiae*

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Amici, respectfully, provide the following brief in support of the State of Texas' Motion for Rehearing. No fee was received in the preparation of this brief.

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are elected legislators chosen by the voters of the State of Texas to promulgate legislation for Texas. *Amici* have worked endless days and nights to pass legislation. The Legislature spends hours upon hours listening to constituent concerns; listening to testimony of subject matter experts and the general public; discussing the language of statutes in session; crafting amendments to improve bills and eventually voting on proposed bills to become law.

The Texas Senate and House of Representatives, through authority from the Texas Constitution[1] have provided the duties and responsibilities of the Attorney General and District Attorney. Constitutionally, the Texas Legislature is charged with promulgating laws to protect elections by ballot.[2] By granting the duty to both the Attorney General and to the District Attorney to prosecute election crimes, the Legislature has not created a separation of powers issue. A finding for the Respondent in this matter would significantly impact the Legislature's ability to protect elections by ballot and dramatically reduce the ability of the Legislature to exercise its constitutional right to determine the duties and responsibilities of the Attorney General and the District Attorney. Amici have an interest in protecting statutes that were drafted by elected legislators. Petitioner Stephens' assertion that laws promulgated by the Texas Legislature are unconstitutional is without merit and the court should deny Petitioner Stephens' request to invalidate these laws.

[1] TEX. CONST. art. IV, § 22 and TEX. CONST. art. V, § 21
[2] TEX. CONST. art. VI, § 4

Senator Paul Bettencourt

Senator Brian Birdwell

Senator Dawn Buckingham

Senator Donna Campbell

Senator Brandon Creighton

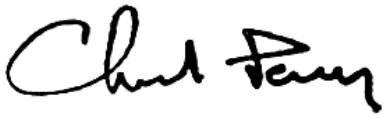
Senator Bob Hall

Senator Bryan Hughes

Senator Lois Kolkhorst

Senator Jane Nelson

Senator Angela Paxton



Senator Charles Perry

Senator Charles Schwertner

Senator Drew Springer

Senator Larry Taylor

ARGUMENT

Amici, have reviewed The State of Texas' Motion for Rehearing and fully support its representations and arguments. Respondent's arguments that this case is an issue of separation of powers between the Attorney General and District Attorney and that the Legislature does not have the authority to delegate prosecutorial duties to the Attorney General are incorrect.

I. THE CONSTITUTION GIVES THE LEGISLATURE AUTHORITY TO ASSIGN DUTIES TO BOTH THE ATTORNEY GENERAL AND THE DISTRICT ATTORNEY.

If the Respondent prevails and the Attorney General is prevented from prosecuting election crimes, there will be a substantial reduction of the constitutional power of the Legislature.

In 1905, a county attorney and district attorney attempted to compel a court to admit them to prosecute a case to recover taxes and exclude the Attorney General from participating in the prosecution. *Brady v. Brooks*, 99 Tex. 366 (Tex. 1905). The court clearly states "[t]he entire question as to who shall represent the state in counties having both a county and a district attorney is solely and absolutely within legislative power and discretion, except in cases in which power is by the constitution specifically conferred upon the attorney general." *Id*. at 14, citing TEX. CONST. art IV, § 22 and TEX. CONST. art. V, § 21.

As early as the Texas Constitution of 1845, the Legislature is given the authority to create laws to determine the duties of the Attorney General and District Attorney.

> The governor shall nominate, and, by and with the advice and consent of two-thirds of the senate, appoint an attorney general, who shall hold his office for two years; and there shall be elected by joint vote of both houses of the Legislature a district attorney for each district, who shall hold his office for two years; and the duties, salaries, and perquisites of the attorney general and district attorneys shall be prescribed by law. TEX. CONST. of 1845 art. IV, § 12 .

Throughout all iterations of the Texas Constitution, the Legislature has the authority to determine the duties of both the Attorney General and the District Attorney, including the current 1876 Texas Constitution.[3] Article 4, section 22 of the Texas Constitution states as follows:

> The Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law. TEX. CONST. art. IV, § 22.

[3] TEX. CONST. art. IV, § 22.

At issue in the present case is the language "other duties as may be required by law,"[4] which the Respondent incorrectly asserts that should be narrowly construed. The Legislature has always had the authority to designate the duties of the Attorney General. The only limitation on the Legislature is that the Legislature cannot prescribe to another entity the duty of inquiring into the charter rights of all private corporations. As specifically stated in the Texas Constitution, the Legislature is entitled to prescribe laws regarding "other duties" for the Attorney General.

The Texas Constitution does not specially designate subject matter duties for the District Attorney as it does for the Attorney General.

> . . . The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature. TEX. CONST. art. V, § 21

Article IV section 22 of the Texas Constitution has one limitation, the Legislature may not delegate the duty of inquiring into the charter rights of private corporations to others. Relying on the language itself, Amici conclude that the ability to prescribe other duties to the Attorney General is not limited by the Texas Constitution, and should be broadly construed.

[4] Tex. Const. art. IV, § 22.

This Court recognized in *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002), that "[t]he Constitution gives the county attorneys and district attorneys authority to represent the State in criminal cases. It authorizes the legislature to give the attorney general duties which, presumably, could include criminal prosecution." *Saldano v. State*, 70 S.W.3d 873, 880 (Tex. Crim. App. 2002).

II. THE LEGISLATURE IS TASKED WITH ENSURING THE ENFORCEMENT OF ELECTION LAWS

The United States Supreme Court held that "A State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989. The United States Supreme Court further emphasized that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

The Texas Constitution requires the Legislature in regards to elections by ballot to "make such other regulations as may be necessary to detect and punish fraud." TEX. CONST. art. VI, § 4. As a result, the Texas Legislature has promulgated numerous election statutes "necessary to detect and punish fraud." The Legislature has given authority to both the Attorney General and district attorneys to carry out the enforcement of election laws in both civil and criminal courts.

The Attorney General works with district attorneys to bring violators to justice and protect the integrity of elections in Texas. The following statutes passed by the Legislature are not overreaching or a destruction of a district attorney's authority to bring election cases to court. The Attorney General has had the authority to prosecute criminal offenses of election laws under these statutes since 1985[5].

> Prosecution By Attorney General Authorized. (a) The attorney general may prosecute a criminal offense prescribed by the election laws of this state.
>
> (b) The attorney general may appear before a grand jury in connection with an offense the attorney general is authorized to prosecute under Subsection (a).
>
> (c) The authority to prosecute prescribed by this subchapter does not affect the authority derived from other law to prosecute the same offenses. TEX. ELEC. CODE § 273.021

> Cooperation With Local Prosecutor. The attorney general may direct the county or district attorney serving the county in which the offense is to be prosecuted to prosecute an offense that the attorney general is authorized to prosecute under Section 273.021 or to assist the attorney general in the prosecution. TEX. ELEC. CODE § 273.022

When a crime is committed within the district, it can impact outside the jurisdiction of a district attorney. A representative of the state, who represents all districts of the state, should be able to participate in the decision of whether or not to bring a criminal action. Participation by the Attorney General is essential to ensure the enforcement of election crimes across the state. To attack the Legislature's authority to assign duties to prosecute election crimes exposes the entire state and erodes the confidence the citizens have in the election process.

[5] Enacted by Acts 1985, 69th Leg., ch. 211 (S.B. 616), § 1, effective January 1, 1986

A violation of an election law in a county may not only impact election results within a district, but may impact election results regionally and state-wide, beyond the boundaries of the district of the district attorney. The Legislature passed laws to ensure that election law violations are prosecuted at the district level across the state. "Our courts have long recognized the Legislature may have sound reasons for having a statewide agency pursue some claims in place of the district or county attorney." *Medrano v.* State, 421 S.W.2d 869, 880 (Tex. App.— Dallas 2014, pet. ref'd), Citing *Brady*, 89 S.W. at 105. In *Medrano*, a justice of the peace argues that his conviction is void, claiming that that Attorney General did not have the authority to bring the prosecution under the Texas Election Code based on a separation of powers issue. The *Medrano* court recognizes that "this statute allows the AG to "step in" when election violation cases may be "politically sensitive" at the local level, which could discourage local prosecutors from acting." *Medrano,* 421 S.W. 2d at 880.

As an elected official, a district attorney may have challenges prosecuting members of the district in a highly politicized environment. Allowing the Attorney General, who also represents the entire state, take the lead in a election case is beneficial to the district and to the state as a whole.

As stated in *Armadillo Bail Bonds v. State*, "a belief on the part of those who drafted and adopted our state constitution [is] that one of the greatest threats to liberty is the accumulation of excessive power in a single branch of government."

Armadillo Bail Bonds v. State, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990). While the Court recognizes that the accumulation of excessive power in one branch of government is detrimental to government, Amici assert that creating a situation where a district attorney is the sole determining entity as to whether or not to enforce election crimes is placing excessive power in one entity and is a threat to liberty in the State of Texas.

Without the Attorney General's ability to step in when a district attorney does not move forward on the investigation or prosecution of an election crime, there will be no deterrent against election fraud in that district. Lack of manpower, lack of resources, lack of knowledge and extreme political pressure are just some of the reasons a district attorney may decline to prosecute election crimes. Preventing the enactment of a statute that gives the authority to the Attorney General to prosecute an election crime does serious harm to the integrity of the election system in Texas and undermines the Legislature's constitutional directive to "make such other regulations as may be necessary to detect and punish fraud."

III. THERE IS NO ISSUE OF SEPARATION OF POWER.

Separation of Powers has been defined by the Texas Constitution:

> SEPARATION OF POWERS OF GOVERNMENT AMONG THREE DEPARTMENTS. The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are

> Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted. TEX. CONST. art. II, § 1

In the Constitution, the Attorney General is placed under the Executive Department[6] while district attorneys are listed in the Judicial Department[7], but neither are given judicial power which is specifically reserved for the courts. TEX. CONST. art. V, § 1.

The Supreme Court defined judicial power as "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for a decision." *Morrow v. Corbin*, 62 S.W.2d 641, 644 (Tex. 1933). This is not the role of a district attorney.

To elaborate, the Supreme Court further stated that "the jurisdiction of trial courts, under the Constitution, once it attaches, embraces every element of judicial power allocated to those tribunals, and includes: (1) the power to hear the facts, (2) the power to decide the issues of fact made by the pleadings, (3) the power to decide the questions of law involved, (4) the power to enter a judgment on the facts found in accordance with the law as determined by the court, (5) and the power to execute the judgment or sentence." *Morrow v. Corbin*, 62 S.W.2d at 645 (Tex. 1933).

[6] TEX. CONST. art. IV, § 1
[7] *See* TEX. CONST. art. V

Harris County District Attorney, John Holmes, argued unsuccessfully to the Supreme Court that the District Attorney was part of the judiciary. In *Holmes v. Morales*, the Supreme Court held that "the district attorney's office is not included in the meaning of "judiciary" because the Texas Constitution invests no judicial power in that office." *Holmes v. Morales*, 924 S.W.2d 920, 922 (Tex. 1996), *quoting Holmes v. Morales*, 906 S.W.2d 570, 573 (Tex. App. — Austin).

Both the Attorney General and district attorneys are attorneys in the courtroom and thereby participate in the judicial branch of government. Both civil courts and criminal courts are part of the judicial branch. To claim that the Attorney General is violating the separation of powers clause because the Attorney General prosecutes in both the civil and criminal courts is factually incorrect. There is no separation of power issues between the Attorney General and district attorneys in regard to the enforcement of election crimes. Separation of powers between the Attorney General and a district attorney cannot be the reason to prohibit the Attorney General from prosecuting election crimes.

In *Medrano*, the court concluded that "the Legislature's enactment of chapter 273 does not delegate a power to one branch that is more properly attached to another nor does it allow one branch to unduly interfere with another." *Medrano* 421 S.W.2d at 880. The *Medrano* Court determined that chapter 273 of the Texas Election Code does not violate the separation of powers doctrine. *Id.*

SUMMARY

The Legislature's constitutional authority to assign duties to the Attorney General should be upheld, particularly in the matters of election fraud investigation and punishment. There is no separation of powers issue between the Attorney General and district attorneys as they both bring cases in the courtroom in the name of the state. Barring the Attorney General from prosecuting election crimes significantly impacts the state's ability to detect and punish election fraud.

PRAYER FOR RELIEF

For the foregoing reasons, the Court should grant the petition for rehearing, vacate the judgment entered on December 15, 2021, and affirm the judgment of the court of appeals.

Respectfully submitted,

/S/ Sonya L. Aston
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief was served electronically on all counsel of record on January 19, 2022.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Texas Rules of Appellate Procedure in that it does not exceed the word limit prescribed by the rule and is written in Times New Roman font, 14 point. This brief contains 2734 words.

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