In the Court of Criminal Appeals of Texas

NOS. PD-1032-20 & PD-1033-20

THE STATE OF TEXAS

v.

ZENA COLLINS STEPHENS,
Appellee

EX PARTE ZENA COLLINS STEPHENS

On Motion for Rehearing after Opinion on
Petition for Discretionary Review
From the First Court of Appeals
Chambers County

YEARY, J., filed a dissenting opinion.

Today, the Court denies the Attorney General's (AG) motion for rehearing. This leaves in place the Court's opinion on original submission deciding that Section 273.021 of the Texas Election Code,[1] which authorizes the AG to prosecute election law offenses, violates the Texas Constitution—specifically, the Separation of Powers Clause found in Article II, Section 1.[2] In my view, however, the Court's opinion on original submission is flawed for a number of reasons, and at least some of those reasons should compel the Court, at this time, even if it must do so only on its own motion, to reexamine and reconsider its opinion on original submission.

To be sure, the Court's original opinion is flawed for many reasons that I have already addressed. I wrote a dissenting opinion on original submission explaining several of the reasons why I disagreed with the Court. My views have not changed. I stick by that opinion. But, having now had even more time to consider the matters at issue in this case, as well as after having received and considered the many briefs that urge this Court to grant rehearing, a few other, new, and perhaps even more important issues have crystalized. Some of these are pointed to in the

---

[1] Section 273.021(a) provides that "[t]he [AG] *may* prosecute a criminal offense prescribed by the election laws of this state." TEX. ELECTION CODE § 273.021(a) (emphasis added).

[2] TEX. CONST. art. II, § 1 ("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***.") (emphasis added).

AG's motion itself and in the briefs filed by amicus curiae. But there are also others which I believe the Court *ought to* address, even on its own motion, because to fail to address them before the Court's judgment becomes final is to misuse the judicial power itself.

First, even assuming—for the sake of argument only—that the Court's opinion on original submission was correct to decide that the AG has no independent authority under our Texas Constitution to prosecute crimes, the Court's opinion was in error, on that account, to *dispose* of the case by ordering the dismissal of Stephens's indictment. In other words, the Court itself erred by ordering an improper *remedy*. Second, once it is resolved that dismissal of Stephens's indictment is an inappropriate response to her claims, it becomes ineluctably clear that Stephens does not even have *standing* to complain about who represents the State in the proceedings against her. Third, former Justice Boatright's amicus curiae argument, that prosecution of crimes is actually an executive department authority, delegated properly to county and district attorneys under the exception clause to the separation of powers provision in our constitution, presents a compelling vision for understanding the separation of powers issue in this case that should be considered by the Court. And fourth, I will address more briefly some other, still lingering concerns I have with the Court's opinion on original submission.

I. The Court's *Disposition* on Original Submission was Improper and is in Conflict with a Prior Decision of this Court

The Court seems to have concluded that the error committed by the AG—in presuming to represent the State on its own, without an

invitation by locally elected prosecuting attorneys, and consequently (in the Court's view) in violation of the separation of powers clause found in our Texas Constitution—went to the very genesis of Stephens's prosecution. *See State v. Stephens*, Nos. PD-1032-20 & PD-1033-20, 2021 WL 5917198 at *17 (Tex. Crim. App. Dec. 15, 2021) ("[T]he Attorney General can prosecute with the permission of the local prosecutor but cannot initiate prosecution unilaterally."). It was perhaps for that reason that the Court ordered dismissal of Stephens's indictment. *See id.* at *11 ("We reverse the decision of the court of appeals and remand the case to the trial court *to dismiss the indictment*.") (emphasis added). But I am now persuaded that the Court's disposition was incorrect, even assuming for the sake of argument that it was correct about everything else. And if the Court's disposition was incorrect, rehearing should be granted, at least so that a proper disposition may be ordered.

The constitutional provision that the Court's original opinion relied upon to demonstrate that the power to *prosecute* cannot exist in, and may not be assigned to, the AG independently because the constitution already assigns that duty elsewhere—to locally elected prosecuting attorneys—does not use the word, or even any form of the word, "*prosecute*." It provides instead that locally elected attorneys shall "represent" the State in "cases." *See* TEX. CONST. art. V, § 21 (providing in part that "[t]he County Attorneys shall *represent* the State in all *cases* in the District and inferior courts in their respective counties") (emphasis added).[3] It speaks to representation of the State in cases, not

[3] *See* Majority Opinion on Original Submission, *State v. Stephens*, Nos. PD-1032-20 & PD-1033-20, 2021 WL 5917198, at *6 (arguing that "the Constitution already grants this authority to county and district attorneys"

necessarily to the initiation of cases, nor more specifically, at least in the criminal context, to the initiation of prosecutions. That may be because prosecutions are not always, or even necessarily, initiated only by elected attorneys.

There is no doubt that, in some situations, an elected or appointed attorney can initiate a prosecution on his own by filing a charging instrument in court. *See, e.g.,* TEX. CODE CRIM. PROC. art. 21.20 ("An 'information' is a written statement filed and presented in behalf of the State by the district or county attorney, charging the defendant with an offense which may by law be so prosecuted."); *see also* TEX. CODE CRIM. PROC. art. 1.141 ("A person represented by legal counsel may in open court or by written instrument voluntarily waive the right to be accused by indictment of any offense other than a capital felony. On waiver as provided in this article, the accused shall be charged by information."). But in other cases, a prosecution may be initiated by the return of an indictment by a grand jury. *See* TEX. CODE CRIM. PROC. art. 21.01 ("An 'indictment' is the written statement of a grand jury accusing a person therein named of some act or omission which, by law, is declared to be an offense."). A grand jury is not a wholly owned subsidiary of a prosecutor. *See, e.g.*, TEX. CODE CRIM. PROC. art. 19.01 (providing that it is "[t]he district judge," not any attorney, elected or otherwise, who must direct that prospective grand jurors be summoned and that their qualifications be tested).[4] It has independent

---

and that, "[b]ecause this is already the specific duty of the county and district attorneys, the court of appeals erred by misconstruing the 'other duties' clause to encompass judicial branch duties.").

investigatory and charging authority.

In this state, a *grand jury* has its own statutory authorization to investigate the commission of any indictable crime, of which any of its members may have knowledge or of which any of them are informed. TEX. CODE CRIM. PROC. art. 2.09 ("The grand jury shall inquire into all offenses liable to indictment of which any member may have knowledge, or of which they shall be informed by the attorney representing the State, or any other credible person."). After a grand jury examines the evidence relating to such a matter, *the grand jury* must vote on whether to present an indictment. *See* TEX. CODE CRIM. PROC. art. 20.19 ("After all the testimony which is accessible to the grand jury shall have been given in respect to any criminal accusation, the vote shall be taken as to the presentment of an indictment, and if nine members concur in finding the bill, the foreman shall make a memorandum of the same with such data as will enable the attorney who represents the state to write the indictment."). The attorney representing the State is not even permitted to be with the grand jury while it discusses the propriety of finding an indictment or while it is voting on an indictment. *See* TEX. CODE CRIM. PROC. art. 20.011(b) ("Only a grand juror may be in a grand jury room while the grand jury is deliberating."); *id*. art. 20.03 ("The attorney representing the State, is entitled to go before the grand jury and inform them of offenses liable to indictment at any time except when they are

[4] Stephens was indicted in April of 2018. All text references to provisions in Chapters 19 and 20 of the Code of Criminal Procedure are to those provisions as they appeared at the time of the indictment. Both Chapters 19 and 20 have since been recodified, but the changes were not intended to be substantive. *See* Acts 2019, 86th Leg., ch. 469 (HB 4173), §§ 1.03, 1.04, 3.01 & 4.01, eff. Jan. 1, 2021.

discussing the propriety of finding an indictment or voting upon the same.").

Following a grand jury's vote to return an indictment, it is indeed the duty of the "attorney representing the State" to "prepare" the indictment, but he does so only for and in aid of *the grand jury*; it is *the foreman of the grand jury* who must "sign [it] officially[.]" *See* TEX. CODE CRIM. PROC. art. 20.20 ("The attorney representing the State shall prepare all indictments which have been found, with as little delay as possible, and deliver them to the foreman, who shall sign the same officially, and said attorney shall endorse thereon the names of the witnesses upon whose testimony the same was found.").[5] Also, it then becomes the duty of *the grand jury* to actually file the indictment initiating the prosecution, not the duty of any attorney who represents the State. *See* TEX. CODE CRIM. PROC. art. 20.21 (stating in part that "[w]hen the indictment is ready to be presented, the grand jury shall through their foreman, deliver the indictment to the judge or clerk of the court"); *id*. art. 20.22(a) (stating in part that "[t]he fact of a presentment of indictment by a grand jury shall be entered in the record of the court, . . ., noting briefly the style of the criminal action, the file number of the indictment, and the defendant's name"). It is best understood, therefore, that the return of an indictment is the independent act of *a grand jury*; it is not the act of any particular attorney who may—properly or

[5] Regardless of whether the AG may properly represent the State independently in post-indictment proceedings against Stephens, the chapter of our Code addressing the authority of the grand jury defines "attorney representing the State" to include "the Attorney General[.]" TEX. CODE CRIM. PROC. art. 20.03. Stephens has not challenged the constitutionality of that provision.

improperly—act to represent the State at the moment it is returned. To my knowledge, the validity of a grand jury's indictment has never before been found to depend on who acts to represent the State at the time of its return.

The AG's role in some of the events that led to Stephens's indictment is undeniable; but now that an indictment has been returned by a grand jury, the AG's role should be considered, at least legally speaking, immaterial. Much of what the AG did consisted of bringing information about the alleged crime to the grand jury for its consideration. The same could have been done by "any other credible person." *See* TEX. CODE CRIM. PROC. art. 2.09 ("The grand jury shall inquire into all offenses liable to indictment of which any member may have knowledge, or of which they shall be informed by the attorney representing the State, or *any other credible person*.") (emphasis added).

Moreover, precedent from this Court establishes that "[t]he return of an indictment establishes probable cause" to believe that the crime alleged therein was committed by the person alleged to have committed it—"as a matter of law." *Ex parte Plumb*, 595 S.W.2d 544, 545 (Tex. Crim. App. 1980). In this case, an indictment was returned and filed by a grand jury, and no one has complained that the grand jury that returned the indictment was not an actual grand jury, or that it was not properly empaneled. No one has shown that, despite the return of the indictment, probable cause has not been established. No one has shown that the indictment is erroneous in either form or substance, in any way. No one has shown a violation of the right to a speedy trial or a violation of the statutory right to a speedy indictment. And no one has

shown the existence of prosecutorial misconduct that prejudicially violated the defendant's right to counsel. Certainly, the Court did not say so in its opinion on original submission. And, even if the AG's apparent desire that Stephens be indicted, and his participation to some degree in the process that led to her indictment, were improper, the AG himself did not indict Stephens! So why does the Court believe that dismissal of Stephens's indictment is the appropriate disposition?

This Court has said before that a trial court may not ordinarily act on its own to dismiss a prosecution. Except in limited circumstances, the Court has only approved dismissals when they have come *at the request of an attorney for the State*, although trial court approval is required. *See State v. Johnson*, 821 S.W.2d 609, 613 (Tex. Crim. App. 1991) ("[E]xcept in certain circumstances, a court does *not* have the authority to dismiss a case unless the prosecutor requests a dismissal. We also hold that there is no inherent power to dismiss a prosecution, since dismissal of a case does not serve to enable our courts to effectively perform their judicial functions and to protect their dignity, independence and integrity. [citation and internal quotation marks omitted]. Last, we find no statutory or constitutional provision which would imply a court's authority to dismiss a case without the State's consent, in contravention of the settled common law. In sum, there is no general authority, written or unwritten, inherent or implied, which would permit a trial court to dismiss a case without the prosecutor's consent."). The Court also pointed to some limited circumstances in which a trial court may dismiss a prosecution without a request from a prosecuting attorney: (1) when there is a defect of form or substance in

a charging instrument; (2) when there has been a violation of the right to a speedy trial; (3) under Code of Criminal Procedure Article 32.01, when there has been a violation of the right to a speedy indictment (TEX. CODE CRIM. PROC. art. 32.01); or (4) when prosecutorial misconduct prejudicially violates a defendant's right to counsel, and excluding evidence will not cure the error. *Johnson*, 821 S.W.2d at 612 n.2. The Court emphasized that "[t]he power to dismiss in these circumstances is authorized by common law or statute and does not give rise to a general right to dismiss in contravention of the general rule[.]" *Id.*

Even assuming for the sake of argument that the AG should not have appeared on behalf of the State in the case against Stephens, that fact does not inexorably lead to the conclusion that she should not be prosecuted, especially in light of the fact that a grand jury returned an indictment against her. No attorney for the State has requested dismissal of Stephens's indictment. None of the limited circumstances identified in *Johnson* that would justify a dismissal without a request from an attorney representing the State are present here. If the Court considers its own precedent in *Johnson* to still be authoritative and correct, it should not simply order dismissal of Stephens's otherwise proper indictment. It would remand for Stephens to answer to the indictment, this time with the participation of a proper attorney representing the State. And, after a proper attorney undertakes to represent the State in this case, that attorney would then properly decide whether to proceed to trial on the grand jury's indictment, or instead move to dismiss it.

The Court should not shy from this conclusion out of concern that

no prosecutor, other than the AG, has yet to show any interest in pursuing Stephens's prosecution. A prosecution without a proper attorney to represent the State is not a new thing under the Texas sun. Not long ago, this very Court wrote an opinion in a case addressing fees ordered to be paid to attorneys who had been appointed to represent the State because the Collin County Criminal District Attorney had recused his office from the case. *State ex rel. Wice v. Fifth Judicial District Court of Appeals*, 581 S.W.3d 189 (Tex. Crim. App. 2018). In that case, this Court observed that "the relevant statutes [of our state] envision that *a trial court has the authority to appoint* counsel for the defense and, *in the case of a recused or disqualified prosecutor's office*, *attorneys pro tem for the state*." *Id*. at 195 (emphasis added).

Indeed, Article 2.07(a) of our Code of Criminal Procedure provides for the appointment of an attorney pro tem when no proper attorney appears to represent the State in a given case. TEX. CODE CRIM. PROC. art. 2.07(a). And even if the AG is not permitted independently, on his own initiative, to represent the State in post-indictment proceedings, whenever a locally elected prosecutor does not appear to pursue an indictment in Texas, the district court judge (who is clearly authorized to exercise the *judicial power* of this state) is empowered by statute to appoint an attorney pro tem to fulfill that duty. *Id*. And, included among those eligible persons who might be appointed an attorney pro tem by the court, at least according to our current statute, is an "assistant attorney general." *Id*. (providing that "[w]henever an attorney for the state is disqualified to act in any case or proceeding, is absent from the county or district, or is otherwise unable to perform the duties of the

attorney's office, or in any instance where there is no attorney for the state, the judge of the court in which the attorney represents the state may appoint, from any county or district, an attorney for the state or may appoint *an assistant attorney general* to perform the duties of the office during the absence or disqualification of the attorney for the state.").[6]

Assuming for the sake of argument that the Court's opinion on original submission was correct (though I remain convinced that it was not), that is what should happen here. The case should be remanded for Stephens to answer the grand jury's indictment, this time to be prosecuted by a proper attorney. The Court ought not to dismiss the indictment outright, especially when it has not been shown to have been returned in error, and when no proper representative of the State has requested dismissal. And it should certainly not do so without explaining why its decision to do so is consistent with the Court's own

---

[6] Article 2.07 was amended in 2019 to provide that either a State's attorney from another jurisdiction or an assistant attorney general may be appointed as attorney pro tem. Acts 2019, 86th Leg., ch. 580 (SB 341), § 1, eff. Sept. 1, 2019. Prior to the amendment, the trial court could appoint "any competent attorney" to serve as attorney pro tem for an absent State's attorney. *See Wice*, 581 S.W.3d at 192 ("The [former] statute provides for the appointment of either private attorneys or prosecutors from other jurisdictions within the state to take over for the recused or disqualified District or County Attorney."). But the 2019 amendment to Article 2.07 applies to any appointment of an attorney pro tem occurring after its effective date of September 1, 2019. Acts 2019, 86th Leg., ch. 580 (SB 341), § 5, eff. Sept. 1, 2019. So, if this case were to be remanded for Stephens to answer to the indictment, it is conceivable that an assistant attorney general could be appointed to prosecute the case, should local prosecutors refuse to get involved.

1991 opinion in *Johnson*.[7]

II. Stephens Lacked Standing to Complain About Who Represented the State in the Proceedings Against Her.

Moreover, once we understand that dismissal of Stephens's indictment is an improper disposition in this case, it becomes easier to comprehend why she has no justiciable interest in the pursuit of her claim. Regardless of who represents the State in the proceedings against her, an indictment—returned by a presumptively valid and unchallenged grand jury—should remain pending. And Stephens should still have to answer to it. This means that Stephens's claims should simply be dismissed because she has no standing even to raise her complaint about the opposing party's legal representative.

(A). The Law of Standing

"Constitutional standing is a prerequisite for subject matter jurisdiction." *Texas Board of Chiropractic Examiners v. Texas Medical Association*, 616 S.W.3d 558, 566 (Tex. 2021). In fact, "[s]tanding is a constitutional prerequisite to maintaining suit[.]" *Williams v. Lara*, 52 S.W.3d 171, 178 (Tex. 2001). "Without standing, the courts cannot

---

[7] *Cf. United States v. Morrison*, 449 U.S. 361, 365 (1981) (reversing a court of appeals' judgement that dismissed an indictment as a remedy for the actions of two Drug Enforcement agents that presumptively violated a defendant's Sixth Amendment right to counsel, and explaining that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though [such a constitutional] violation may have been deliberate"); *United States v. Blue*, 384 U.S. 251, 255, (1966) ("So drastic a step [as dismissal of indictment] might advance marginally some of the ends served . . ., but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.").

proceed at all." *Abbott v. Mexican American Legislative Caucus, Texas House of Representatives*, 647 S.W.3d 681, 693 (Tex. 2022) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Black's Law Dictionary defines standing as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." BLACK'S LAW DICTIONARY 1695 (11th ed. 2019). It further explains that "[t]o have standing in federal court, a plaintiff must show (1) that the challenged conduct has caused the plaintiff actual injury, and (2) that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question." *Id*.

The Texas Supreme Court has explained that the standing doctrine "requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court." *Heckman v. Williamson County*., 369 S.W.3d 137, 154 (Tex. 2012). It has also said that, to have standing, "a plaintiff must be personally aggrieved; his alleged injury must be concrete and particularized, actual or imminent, [and] not hypothetical." *Daimler Chrysler Corp. v. Inman*, 252 S.W.3d 299, 304–05 (Tex. 2008). A party will not lack standing, that court has said, "simply because he cannot prevail on the merits of his claim." *Id.* He will lack standing, however, if "*his claim of injury is too slight* for a court to afford redress." *Id.* (emphasis added).

In *Fuller v. State*, this Court observed that, "[i]n Texas, the law of standing has been developed mainly in the courts of civil jurisdiction." 829 S.W.2d 191, 201 (Tex.Crim.App.1992), *cert. denied*, 508 U .S. 941 (1993), *overruled on other grounds by Castillo v. State*, 913 S.W.2d 529

(Tex.Crim.App.1995). It explained the doctrine, as it applies in our courts, in this way: "[S]tanding is a constituent requirement of justiciability, the basic posture in which a controversy must appear to be cognizable by the courts." *Id.* Indeed, it explained, "[i]t is a fundamental rule of law that only the person whose primary legal right has been breached may seek redress for an injury." *Id.* (quoting *Nobles v. Marcus*, 533 S.W.2d 923, 927 (Tex. 1976)).

"For a person to maintain a court action," the Court in *Fuller* explained, "he must show that he has a justiciable interest in the subject matter in litigation, either in his own right or in a representative capacity." *Id.* (quoting *Housing Authority v. State ex rel Velasquez*, 539 S.W.2d 911, 913 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.)). "One who has not suffered an invasion of a legal right[,]" according to the Court, "does not have standing to bring suit." *Id.* at 202 (quoting *Sherry Lane Nat. Bank v. Bank of Evergreen*, 715 S.W.2d 148, 152 (Tex. App.—Dallas 1986, writ ref'd n.r.e.)). *See also State v. Granville*, 423 S.W.3d 399, 405 (Tex. Crim. App. 2014) ("The 'standing' doctrine ensures that a person may claim only that his own rights have been violated; he cannot assert that he is entitled to benefit because the rights of another have been violated."). And courts simply "lack the authority to answer abstract questions of law or to entertain litigation by persons who have not suffered actionable injury[.]" *Id.*

It is also the burden of "the party who invokes the courts' jurisdiction" to "'establish[] the[] elements' of standing; it is not the duty of the other side, or of the courts, to negate them." *Abbott*, 647 S.W.3d at 693 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. at 561). And

because standing impacts the court's jurisdiction over the subject matter of a lawsuit, it does not matter whether the parties raise it. It is a matter that courts should address on their own. *See American K–9 Detection Services, LLC v. Freeman Eyeglasses*, 556 S.W.3d 246, 260 (Tex. 2018) ("Subject matter jurisdiction is an issue that may be raised for the first time on appeal[,] it may not be waived by the parties, and it may—indeed, must—be raised by an appellate court on its own.") (footnotes, internal quotation marks, and citations omitted). Court action to resolve a claim brought by a party who lacks standing is manifestly inconsistent with the judicial power. *San Jacinto River Authority v. Medina*, 627 S.W.3d 618, 631 (Tex. 2021) (Blacklock, J., dissenting) ("[t]he judicial power does not include the authority to answer an 'abstract question of law without binding the parties.'") (quoting *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993)).

(B). Background Facts

Stephens's prosecution was formally initiated when she was indicted *by the Chambers County grand jury* for one count of tampering with a governmental record in violation of Texas Penal Code Section 37.10 (TEX. PENAL CODE § 37.10) and two counts of unlawfully making or accepting a contribution in violation of Texas Election Code Section 253.033(a) (TEX. ELECTION CODE § 253.033(a)).[8] This Court's opinion on

[8] The court of appeals got this fact wrong in its opinion, claiming instead that "[t]he Attorney General . . . indicted . . . Stephens[.]" *State v. Stephens*, 608 S.W.3d 245, 248 (Tex. App.—Houston [1st Dist.] 2020). This Court's opinion on original submission, however, correctly observed that "the Chambers County grand jury indicted Stephens[.]" *Stephens v. State*, Nos. PD-1032-20 & PD-1033-20, 2021 WL 5917198 at *1 (Tex. Crim. App. Dec. 15, 2021). This fact is important to the framing of the issue because failing to be precise obscures the, at least, plausible difference between *initiating* a

original submission accurately recounted the events that followed in the trial court:

> Stephens filed a motion to quash the indictment, arguing the Attorney General did not have authority to prosecute a violation of the Penal Code, and an application for a pretrial writ of habeas corpus, challenging the constitutionality of Texas Election Code section 273.021. The trial court granted Stephens's motion to quash Count I, finding that the Attorney General lacked authority to prosecute an offense outside the Election Code. However, the trial court denied Stephens's motion to quash Counts II and III. The trial court also denied Stephens's pretrial habeas corpus writ without comment.

State v. Stephens, 2021 WL 5917198 at *1. Stephens and the State then both appealed the trial court's orders.

The State's appeal is not pertinent to the issue of Stephens's standing to bring the complaints that this Court addressed in its original opinion, so I will not linger on that event here. Stephens, however, appealed the denial of her application for a pretrial writ of habeas corpus on the ground that the legislative delegation of authority to prosecute election laws found in Election Code Section 273.021 violates the separation of powers provision in our Texas Constitution. *Id*., at *2. The First Court of Appeals in Houston then affirmed the trial court's decision to deny Stephens's application for pre-trial habeas relief. *Id*. *See State v. Stephens*, 608 S.W.3d 245, 256 (Tex. App.—Houston [1st Dist.] 2020).

After losing her complaint on habeas in the court of appeals, Stephens petitioned this Court for discretionary review arguing, among

---

prosecution and *representing the State* in post-indictment proceedings against an accused.

other things, that the grant of prosecutorial authority afforded by Election Code Section 273.021 violates the separation of powers requirement in the Texas Constitution. *State v. Stephens*, 2021 WL 5917198 at *1. On that ground, this Court's opinion on original submission reversed the decision of the First Court of Appeals and remanded this case to the trial court with instruction to dismiss the indictment. *Id.* at *11.

At oral argument in this case, I asked the parties about whether Stephens had standing to raise her complaint. Stephens's counsel, Mr. Chad Dunn, responded that she does, explaining that "[f]or the same reasons that Governor Perry had standing to raise separation of powers complaints in *Ex parte Perry*, this Court's decision from 2016." He went on to say:

> In fact, this Court explicitly said in that opinion that a writ of habeas corpus by a defendant was the manner in which a defendant raises the constitutionality of their prosecution, whether or not the prosecutor has jurisdiction to proceed on it. So, we stand on that case for the proposition that it is absolutely the defendant's right to raise it. And on the matter of harm, always an important component of standing, it's, there's no question that Zena Stephens suffered more than anyone else at this moment in this case by the Attorney General exercising authority that he doesn't have.

Oral Argument at 12:00. Assistant AG, Judd Stone, then replied:

> I think, I think at minimum, for purposes of an as applied challenge, the attorney general is prosecuting her as he can prosecute her for a crime, so at least for purposes of an as applied challenge, and the undue interference test, uh, the

> undue interference office test, she would plainly have standing. I think it is a harder question as to whether or not she can bring facial claims as to all other possible defendants at any given time. I think that is a much more difficult question. I think her challenges fail on facial grounds on the merits as I have articulated before. But I think this Court has a hard question it has to answer as to whether she has the standing, uh, she has standing to make facial challenges to the attorney general's jurisdiction in a wide swath of cases in which she is not a party. She certainly has standing for purposes of the charges brought against her.

Oral Argument at 44:30.

Even though the question was raised at oral argument and the parties addressed the issue, the Court's original opinion was silent on the issue of standing. Also, none of the Court's side opinions, including (regrettably) my own, purported to address the matter at all.

(C). Analysis

At oral argument, counsel for Stephens answered my question about his client's standing to make her complaint about the AG by referring to this Court's opinion in *Ex parte Perry* "from 2016." But *Ex parte Perry* did not even address *standing* in the sense that drove my concern. It addressed instead *cognizability* of a claim on pretrial habeas. *See Ex parte Perry*, 483 S.W.3d 884, 895 (Tex. Crim. App. 2016) ("We first address whether the court of appeals was correct in holding that Governor Perry's separation of powers claim is not cognizable on pretrial habeas."). And, although counsel for the AG did not directly invoke *Perry*, he seemed to have answered, similarly, that Stephens was permitted to complain about facial constitutional issues on pretrial

habeas.[9]

But the real dilemma that motivated my oral argument inquiry was the fact that, at least ordinarily, a party in opposition in litigation has no legitimate interest in controlling who (that is, what lawyer) might represent the opposing party in the litigation. "I choose my lawyer, you choose yours," is the regular order of the day. *Cf. In re Robinson*, 90 S.W.3d 921, 926 (Tex. App.—San Antonio 2002, no pet.) (conditionally granting mandamus relief to require the trial court to set aside an order disqualifying an opposing party's counsel where no conflict of interest was shown); *see also Jones v. Lurie*, 32 S.W.3d 737, 744 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (deciding that, where appellants had never been "represented by" counsel for the defendant, they had "no standing to complain of his representation" of the defendant); *Glassell v. Ellis*, 956 S.W.2d 676, 685 (Tex. App.—Texarkana 1997, pet. dism'd w.o.j.) (deciding that a defendant in a class action civil suit did not have standing to complain about the lawyer representing the parties that were seeking to recover from him and explaining that "it is the clients who make the complaint that their attorney has a conflict of interest").

In this case, Stephens sought to have her opponent's counsel, the lawyer who appeared on behalf of the State against her—namely, the AG—removed on the ground that the AG was not constitutionally

---

[9] The question in this case is not the facial constitutionality of the statute under which the defendant was being prosecuted, but instead the constitutionality of the statute affording the AG the independent authority to represent the State in the proceedings against her. The latter is a question that I contend she has no legitimate interest in challenging, though others, including the trial court and the locally elected district attorney, might.

authorized to independently represent the State in proceedings against her. But Stephens had no legitimate interest in deciding which lawyer appeared in court to represent the State of Texas against her. She did not allege that the AG had a conflict of interest in her case. Nothing about who appeared on the State's behalf had any tendency to suggest that the indictment returned against her by the grand jury in Chambers County was invalid or otherwise rightly subject to dismissal. And nothing about the Court's determination on original submission—that the AG was precluded from independently representing the State in the proceedings against Stephens—should require the Court to dismiss her indictment.

Indeed, Stephens's position in this litigation will not be improved at all by removing one lawyer in opposition, only to have that lawyer replaced by another lawyer who would presumptively stand similarly in opposition to her interests. It is also hard to imagine that the delegation of the authority to represent the State to locally elected attorneys, in Article V of our constitution, TEX. CONST. art. V, § 21, was established in order to furnish *a right of a defendant* against prosecution for crimes for which probable cause has been determined to exist "as a matter of law." *Plumb*, 595 S.W.2d at 545.

In other words, Stephens asserts no concrete right that could be resolved by the courts in the litigation of her claim. *See Heckman*, 369 S.W.3d at 154. As far as she is concerned, who might properly represent the State is only an *abstract question of law*, with no bearing at all on whether a prosecution against her has been properly initiated or on whether it ought properly to continue. *See San Jacinto River Authority*

627 S.W.3d at 631 (Blacklock, J., dissenting); *Fuller*, 829 S.W.2d at 201.

So then, who would have a justiciable interest in pursuing the issue the Court purported to address on original submission in this case? Who would have had a stake in preventing the AG from unconstitutionally (in the Court's view) seeking to independently represent the State? The person or party who might have had standing to complain about the AG's attempt to represent the State independently is the District Attorney of Chambers County.

Brady v. Brooks, 99 Tex. 366, 89 S.W. 1052 (1905), which was discussed at length on original submission by both the Court's opinion and my dissent, was only invoked there to answer a different question. My dissent argued that the Texas Supreme Court's opinion in *Brady* supported the conclusion that the AG should be permitted to represent the State in the proceedings against Stephens. The Court, in its own opinion, disagreed. But the Court's opinion, and my own, made no reference to the standing issue.

Even so, *Brady* illustrates my point about Stephens's lack of standing. In that case, the AG had brought suit in the name of the State of Texas to recover taxes and penalties against the Higgins Oil & Fuel Company, a corporation. The local county attorney and district attorney sued in mandamus for the right to represent the State in that action. *See Brady*, 99 Tex. at 373, 89 S.W. at 1053 (stating that "the district attorney [for the Twenty-Sixth Judicial District] and the county attorney of Travis county appeared in court and filed a joint motion praying to be allowed to prosecute the suit and that the Attorney General be excluded from participation in such prosecution"). The suit

was not, as in this case, instituted by the opposing party to the lawsuit—the Houston & Texas Central Railroad Company (the party from whom the State sought recovery through the AG's underlying lawsuit). Had the action been brought by the defendant railroad company, I believe the Texas Supreme Court would have had cause to question the railroad company's standing to complain about who might represent the State in the action against it.

Similarly, here, the right at stake comes down to: Who is entitled *to represent the State* in this action? If it were the local district attorney bringing the suit to take control of the prosecution of Stephens, then perhaps, consistent with the facts at play in *Brady*, he might have standing to complain about the AG's actions, which the district attorney might argue invaded his own constitutional authority. But, at least consistent with a proper understanding of an appropriate disposition in this case—remand for appearance of, or appointment of, a proper prosecutor—Stephens should not even be permitted maintain this suit. Whether or not the AG represents the State, someone should be permitted to do so, even if that representative only appears in order to file a motion to dismiss. It is not up to Stephens whether she is prosecuted. It is up to the State, represented—of course—by a proper attorney.

This is a substantial question. All courts must, in addition to being open to hearing the arguments of counsel, independently and carefully consider whether the party bringing suit has standing to maintain the claims she makes. Failing to do so could result in a court exercising its authority where, in reality, it has no subject matter

jurisdiction over the question presented. And, by entering judgment under those circumstances, the court may itself violate the constitutional requirement of separated powers. Courts, after all, are not empowered to issue advisory opinions. *Petetan v. State*, 622 S.W.3d 321, 334 (Tex. Crim. App. 2021) ("Texas courts are not empowered to give advisory opinions.").

At the very minimum, this Court ought to withdraw its original opinion and remand for the court of appeals to consider in the first instance whether Stephens *ever* had standing to raise her complaints about the AG's constitutional authority to independently represent the State in the case against her. Failing that, the Court should simply dismiss her appeal and order the dismissal of her habeas application on the ground that she lacks the requisite standing to complain about the AG representing the State in the case against her.

III. Former Justice Boatright's Amicus Arguments Should be Considered.

But if the Court should disagree with me about the impropriety of dismissal of the indictment as a remedy, and about Stephens's lack of standing to bring her complaint about the AG's independent representation of the State in these proceedings, the Court should then consider the substantial arguments made by Jason Boatright, a former Justice on Texas's Fifth Court of Appeals, and a former law clerk on this Court, in his amicus curiae brief on motion for rehearing. The Court's opinion on original submission assumed that the authority to "prosecute" is a "power properly attached" to the judicial department because the authority to "represent the state" is granted to locally elected attorneys within the part of the Texas Constitution labeled

"Judicial Department." *See, e.g.*, *Stephens*, 2021 WL 5917198 at *8 ("Simply put, the 'other duties' clause may not transform the judicial duty of prosecutorial power into an executive duty."). But the Court has never squarely addressed the difference, if there is any, between an authority, or a duty, and a power. The Court has also never addressed whether an authority or duty, granted within a particular article of the constitution that also creates a department of government, is necessarily a power "properly attached" only to that department of government created within the same article. The Court has, at best, only ever assumed the answers to these questions.

What is clear is that virtually everywhere else it is found or described, prosecutorial discretion is in fact, by its very nature, considered to be a core executive department function. *See, e.g.*, BLACK'S LAW DICTIONARY 715 (11th ed. 2019) (defining "executive power" as "the power to see that the laws are duly *executed and enforced*") (emphasis added). I alluded to this unaddressed (by the Majority) issue in my dissenting opinion on original submission, but the Court did not respond to it. *Stephens*, 2021 WL 5917198 at *16 n.7 (Yeary, J., dissenting) ("I regard representing the interests of the State in judicial proceedings to be more of an executive function than a judicial one.").

Former Justice Boatright brings these issues into much clearer perspective. He rightly observes in his amicus curiae brief that Article V, Section 1, of our Texas Constitution vests the "judicial power" fully, completely, and only, in our courts.[10] It does not purport to vest any of

[10] Specifically, in pertinent part, Article V, Section 1, provides:

that "power" in ordinary lawyers, or even in any elected lawyers whose creation is established under the judicial department article of our constitution, who might thereafter represent the State in our courts.

Article V itself does provide for the election of county and district attorneys, and it requires that those elected attorneys "shall represent the State in all cases in the District and inferior courts in their respective counties." TEX. CONST. art. V, § 21. But the creation of county and district attorneys and the inclusion of the command that they "represent the state" in the district and inferior courts within the Article devoted to the judicial department of our state government should be more clearly understood only as the imposition of a duty, or the grant of an authority, to specific attorneys, to perform an executive function of the state *in our state courts*: representing the State to see that the laws are properly "executed and enforced." It should not be understood to confer an exclusively judicial branch power.

That this is true should be clear from the conferral of, in that same article, the authority to regulate the duties of those locally elected attorneys—when their co-existence in the same jurisdiction must be addressed—to the legislative department, *rather than to judges*. Article V, Section 21, of our constitution provides in part that "if any county shall be included in a district in which there shall be a District Attorney,

---

> "The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law."

TEX. CONST. art. V, § 1.

the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature." TEX. CONST. art. V, § 21. This conferral in the constitution to the Legislature of the right to regulate the duties of locally elected attorneys should be considered similar to its conferral of the authority to "represent the state" to locally elected attorneys in the same section of Article V (and, for that matter, the conferral to the Legislature of the authority to regulate the AG's authorities by conferring "other duties," as provided in Article IV. *See* TEX. CONST. art. IV, § 22). Article V, Section 21, does not convert the Legislature into an actor who wields the judicial power of the state any more than does the conferral of the authority to "represent the state" in that same section transform locally elected attorneys into persons who wield that power.

Even if the complexity of the Texas Constitution and our own reflections on the history of our Great State require a conclusion that "prosecution" is not *necessarily only* an executive authority, the fact that it is considered to be such in every other sovereign benefiting from a separated power structure like our own suggests that the answer to the question may not be at all as clear as the Court suggested in its opinion on original submission. In fact, the Court might have been better off to conclude that prosecutorial authority should be considered a hybrid authority in Texas. Either way, the Court's definitive declaration that prosecution is an exclusively judicial power is not well supported.

If the view of the nature of the prosecutorial power advanced by former Justice Boatright is found to be correct, there should be no concern that it would open the State to an argument that locally elected

prosecutors, created under Article V of our state constitution, should not maintain authority to represent the State in the district and inferior courts because of the article requiring separation of powers. The exception to the Separation of Powers Clause in our constitution would certainly permit locally elected attorneys, even though created within the judicial department of government, to exercise the executive authority to represent the State because the constitution expressly permits—indeed, *requires*—that. *See* TEX. CONST. art. II, § 1 ("except in the instances herein expressly permitted"*)*; *see also* TEX. CONST. art. V, § 21 ("The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties[.]"). But regardless of whether prosecutorial discretion is judicial or executive in its nature, or a hybrid of the two, the Texas Constitution is not actually offended by its legislatively authorized exercise, on a limited basis, by the AG. *See Stephens*, 2021 WL 5917198 at *16 & n.7 (Yeary, J. dissenting).

Finally, I would be remiss if I did not also emphasize again here that Article V of our constitution does not even really speak to "prosecutorial power" in the way that the Court's opinion on original submission suggested it does. It only expressly confers upon locally elected attorneys, in Article V, Section 21, a duty or an authority to "represent the state," *not* any unique authority to "prosecute." TEX. CONST., art. V, § 21. Our constitution, in Article IV (Executive Department), literally uses this exact same language—"represent the state"—in its express description of the duties of the AG. *See* TEX. CONST. art. IV, § 22 ("The Attorney General shall *represent the state* . .

.") (emphasis added). But instead of understanding the duplication of these exact, specific, and identical words to mean that "represent[ing] the state" is not specifically or exclusively a judicial power, the Court's opinion on original submission declares the matter settled with such great confidence that one might believe, in error, that *the constitution actually says* that "prosecution is a judicial power" and that "the AG may not prosecute crimes without an invitation from a locally elected prosecutor." *See Stephens*, 2021 WL 5917198 at *9–10 (asserting that the AG lacks constitutional authority "to prosecute a crime . . . without the consent of" local prosecutors "by a deputization order"). Take my word for it—or do not and look it up for yourself— *our constitution does not say those things*.

Former Justice Boatright's amicus brief on rehearing makes a compelling case. It is probable that our courts have for too long presumed that authorities granted, or duties imposed, in articles of our constitution establishing departments of our government necessarily are "properly attached" only to the department created in the same article wherein those authorities or duties are conferred or imposed—and to no other. At least where such identical authorities are conferred in articles establishing other departments of government, we should seriously question any conclusion that those authorities represent "powers" that are exclusive only to one or the other department.

The authority to "represent the state" in the district and inferior courts is conferred only in a general sense to local prosecutors in Article V of our constitution. The authority to "represent the state" in the courts of our state is similarly conferred on the AG, in more specific ways, in

Article IV of our constitution. "Represent[ing] the state" in court is therefore *not* exclusively an authority "properly attached" only to either the judicial or the executive departments of our government. This is true, even though the different elected officials created within the articles that establish both of those departments may at different times be called upon to exercise that same authority or duty in unique ways.

In the absence of more clear guidance in the Texas Constitution about the nature of the authorities or duties therein conferred, the courts should take a more measured position with regard to their understanding of them and exercise deference to the elected representatives of the people in the Legislative Department for the regulation of those authorities. This is especially true in this case because the constitution itself clearly and expressly affords the Legislative Department the authority to impose "such other duties as may be required by law" on the AG, who is one of the two types of elected officers upon whom the authority to "represent the state" is constitutionally conferred: (*i.e.*, (1) locally elected attorneys, and (2) the AG). That is certainly a preferable course to the one chosen by the Court on original submission: simply to declare in an opinion, with very little, if any, textual support, that a subset of the duty to "represent the state" *not even specifically or uniquely mentioned in Article V, Section 21*—namely, "prosecution"—is actually *only* properly attached to a specific department of government—the judicial one.

IV. Final Thoughts

Finally, there remain four elements of the Court's analysis on original submission that I feel compelled to further discuss, some of

which I may have already at least partially addressed in my dissenting opinion on original submission.

First: I previously wrote to complain about the Court's conclusion that the canon of construction known as *ejusdem generis* counsels in favor of reading "other duties" in Article IV, Section 22, of our constitution to be limited to executive branch duties. TEX. CONST. art. IV, § 22. My objection was that I did not find the explicit list of AG duties provided in Article IV, Section 22, to be of the same sort to begin with, so as to justify the invocation of the *ejusdem generis* canon at all. I would, therefore, have found the *ejusdem generis* canon to simply be inapplicable. *See Stephens*, 2021 WL 5917198 at *16 (Yeary, J., dissenting) ("But in fact, it seems to me a mistake to suppose that *ejusdem generis* should have any application at all in construing Article IV, Section 22.").

In its motion for rehearing, however, the AG has now argued that the Court should grant rehearing at least to identify what it did not on original submission—namely, exactly what principle of sameness might unify those duties that are explicitly listed in Article IV, Section 22. I agree with this criticism of the Court's opinion on original submission. The *ejusdem generis* canon provides that "[w]here general words follow an enumeration of two or more things, they [the general words] apply only to persons or things of the same general kind or class specifically mentioned [in the more specific enumerations]." Antonin Scalia & Brian A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, at 199 (2012). But the Court's opinion on original submission does not appear anywhere to say—at least not explicitly—what principle of sameness

animated its conclusions about the possible breadth of the "other duties" clause in Article IV, Section 22.

In fact, all the Court has so far said about the matter is that "[r]epresenting the state in a criminal prosecution for election law violations is *not of the same character* as representing the state in suits to prevent corporations from exercising authority not authorized by law." *See Stephens*, 2021 WL 5917198 at *6 (emphasis added). If the Court were to provide a direct answer to the question of what principle of sameness unites the specifically enumerated duties in Art. IV, Section 22, I imagine the Court might say it is that they were all exclusively "civil" in nature. *See id.* at *9 (explaining that the AG "is limited to representing the State in civil litigation") (quoting *Saldano v. State*, 70 S.W.3d 873, at 880 (Tex. Crim. App. 2002)).[11] But I would not be so sure about that. I am convinced, therefore, that the Court should check its work before allowing its opinion to become final.[12]

One of the duties expressly imposed on the AG in Art. IV, Section 22, is to "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

---

[11] County Attorneys and District Attorneys, created in Article V, also sometimes exercise the authority to represent the state in "civil" cases as well. So, drawing a "civil" versus "criminal" distinction seems like flawed logic. May the Legislature take away ALL of the County and District Attorneys' authority to represent the State in "civil" cases, *but not* also divert some limited authorities in "criminal" cases to the AG?

[12] They certainly are not *expressly* civil-only in nature. The word "civil" does not even appear anywhere in that article. TEX. CONST. art. IV, § 22.

not authorized by law." TEX. CONST. art. IV, § 22 (emphasis added). Nothing about the obligation to "*take" "proper and necessary" "action in the courts" "to prevent*" corporations from doing things "*not authorized by law*" suggests to me that it excludes the possibility of undertaking criminal prosecutions to accomplish those ends. There is no question that "corporations" are included in the definition of "[p]erson[s]" who are capable of being prosecuted for criminal acts. *See* TEX. PENAL CODE § 1.07(38).[13] There are also offenses that corporations specifically may be prosecuted for committing that might prevent corporations "from exercising any powers" or collecting fees "not authorized by law." *See, e.g.*, TEX. TAX CODE § 171.363 (Willful and Fraudulent Acts).[14] One way the AG might choose to "take such action in the courts . . . to prevent" private corporations from exercising such "powers[,]" or from "demanding or collecting" such unauthorized fees, is to *prosecute* corporations that do things that violate the law.[15] It may well be that, contrary to the impression the Court has left with its opinion on original

---

[13] Moreover, because Section 1.07 of the Penal Code falls under Title 1 of that Code, its provisions "apply to offenses defined by other laws, unless the statute defining the offense provides otherwise[.]" TEX. PENAL CODE § 1.03(b). Presumably that means that Section 1.07(38)'s definition of "person" to include corporations could have wide application to offenses defined beyond the Penal Code itself.

[14] This statute provides in part that a "taxable entity" may commit certain offenses. Our tax code also defines "taxable entity" to include "corporations." TEX. TAX CODE § 171.0002(a).

[15] I gather that Judge Slaughter, at least, agrees with this proposition. *See* Dissenting Opinion of Judge Slaughter, at 52 n.108 ("[I]f the Legislature were to enact such statutes, I believe it would fall within the AG's core duties to prosecute such offenses directly in the trial courts.").

submission, the AG is indeed explicitly delegated authorities in Article IV, Section 22, that are broad enough to include potential criminal prosecutions, whether authorized explicitly by the Legislature or not. And if that is the case, then perhaps even the Court's understanding of a proper application of *ejusdem generis* should favor a conclusion that the "other duties" clause in Article IV, Section 22, may also permit legislative assignment of other, limited, prosecutorial duties.

Second: It appears that the Court's exclusive focus, in its opinion on original submission, relating to the constitutional authority of the AG to independently represent the State in this case, was on the following articles of our Texas Constitution: Article II, Section 1 (Separation of Powers); Article IV, Section 22 (Attorney General); and Article V, Section 21 (County and District Attorneys). But the Court's analysis wholly failed to consider whether any other provision in the constitution might authorize the Legislative Department to regulate which elected officials might be permitted to prosecute election law crimes. And there is at least one other constitutional provision that could potentially be construed to authorize the Legislature to empower the AG to prosecute Stephens, even independently.

Article VI of the Texas Constitution—entitled "Suffrage"—provides, in Section 4, that "the Legislature shall . . . make such other regulations as may be necessary *to detect and punish* fraud and preserve the purity of the ballot box." TEX. CONST. art. VI, § 4 (emphasis added). That "Suffrage" was given its own article in our constitution, alone, suggests a singling out of that topic by those who adopted it. The integrity and inviolability of the vote, it seems, was a matter of special

importance. After all, if the people cannot trust the election process in the state, they will not trust the government. And the laws that give structure and effect to the franchise are singularly and specifically addressed in Article VI, in a manner differently than other laws, including other crimes.

Does the primacy of a separate "Suffrage" provision in the constitution suggest that an entirely different approach to the matter ought to be taken from other, more general constitutional provisions—including determining *how to*, and *who may*, seek to "detect and punish" those who might corrupt the vote? There are seventeen unique articles in our constitution.[16] Might Section 4 of Article VI properly control who decides who may appropriately prosecute election crimes, as opposed to all other types of crimes (as may be proscribed in Article V, Section 21)? Might the existence of this article suggest that the Legislature, as

---

[16] Article I. Bill of Rights;
Article II. The Powers of Government;
Article III. Legislative Department;
Article IV. Executive Department;
Article V. Judicial Department;
Article VI. Suffrage;
Article VII. Education;
Article VIII. Taxation and Revenue;
Article IX. Counties;
Article X. Railroads;
Article XI. Municipal Corporations;
Article XII. Private Corporations;
Article XIII. Spanish and Mexican Land Titles;
Article XIV. Public Lands and Land Office;
Article XV. Impeachment;
Article XVI. General Provisions; and
Article XVII. Mode of Amending the Constitution of This State

opposed to locally elected attorneys, may possess special powers in this realm, constitutionally speaking, to decide who should or who may seek to "detect and punish" those who would engage in voter fraud? This provision and its effect on the constitutionality of Election Code Section 273.021 is presently unknown, at least by the work of this Court so far; but the Court's opinion on original submission purports to declare Section 273.021(a) flatly to violate *the constitution—all* of it. The Court takes no account of the possibility that the statute might be authorized by some *other* provision of the constitution. Would the Court still consider Section 273.021(a) to violate the constitution should it be called upon to consider the authorizations embodied in Article VI, Section 4? Unless the Court grants rehearing to consider this issue, we may never know, and the proper functioning of our unique constitution may be thwarted indefinitely.

Third: Ordinarily, a facial challenge to the constitutionality of a statute can succeed only when it is shown that the statute is unconstitutional in *all* of its potential applications. *Wagner v. State*, 539 S.W.3d 298, 310 (Tex. Crim. App. 2018). The Court has also acknowledged that, when interpreting statutes, it has "a duty to employ, if possible, a reasonable narrowing construction in order to avoid a constitutional violation." *Ex parte Ingram*, 533 S.W.3d 887, 895 (Tex. Crim. App. 2017). A *duty*.

Section 273.021(a) of our Election Code provides: "The attorney general *may prosecute* a criminal offense prescribed by the election laws of this state." TEX. ELECTION CODE § 273.021(a) (emphasis added). The Court's opinion on original submission also accepted that nothing in

Section 273.021(a) *requires* the AG to prosecute such crimes. *See Stephens*, 2021 WL 5917198 at *8 ("[N]othing in Texas Election Code section 273.021 requires the Attorney General to initiate prosecution for an election code violation."). And that opinion also explicitly accepted that, upon invitation by a locally elected prosecutor, the AG *may prosecute* election law crimes consistent with our constitution. *See Id.* ("[T]he Attorney General can prosecute with the permission of the local prosecutor[.]"). The Court grounded this conclusion on language it observed in the Texas Government Code. Specifically, Section 402.028(a) of the Government Code *permits* prosecutions by the AG *when requested* by a locally elected prosecuting attorney. *See* TEX. GOV'T CODE § 402.028(a). ("At the request of a district attorney, criminal district attorney, or county attorney, the attorney general may provide assistance in the prosecution of all manner of criminal cases, including participation by an assistant attorney general as an assistant prosecutor when so appointed by the district attorney, criminal district attorney, or county attorney.").

On original submission, however, the Court did not acknowledge that, at least in cases in which the AG is invited to prosecute by locally elected prosecutors, the merely permissive force of Section 273.021(a) of the Election Code would not operate unconstitutionally. In other words, the specific permissive authorization to prosecute election crimes found in Section 273.021(a) does not operate unconstitutionally in cases in which the AG is invited to prosecute by locally elected prosecuting attorneys. And, had the Court made that observation on original submission, while considering both its duty to construe statutes

constitutionally where possible *and* its obligation not to declare a statute facially unconstitutional unless it can be said that the statute operates unconstitutionally in all of its applications, it ought to have found the statute not to be facially unconstitutional.

To be clear, I remain convinced that Section 273.021(a) should be read to constitutionally provide, at least, *independent* authority to the AG to prosecute election law crimes, even in the absence of an invitation by a local prosecutor. But even as the Court ultimately drew the conclusion that I was wrong about that, it should have still acknowledged potential constitutional applications of that law when the AG is invited to prosecute by locally elected attorneys. And that should have caused the Court to reject the conclusion that there was no possible constitutional application of the law.

Because there is at least one potential circumstance in which the permissive authorization provided for in Section 273.021(a) of the Election Code can be applied, Stephens's facial constitutional challenge to that law should have been rejected. At most, Stephens might have demonstrated a mere statutory violation in her case due to the potential absence of an invitation to prosecute by locally elected prosecutors under Government Code Section 402.028(a). But mere statutory violations are ordinarily not cognizable on habeas. *Ex parte Carter*, 521 S.W.3d 344, 349 (Tex. Crim. App. 2017) (explaining that "bare statutory violations" are not cognizable in habeas). And as-applied constitutional challenges are similarly not cognizable when brought in pre-trial habeas proceedings. *Perry*, 483 S.W.3d at 895 ("[W]e have stated that pretrial habeas cannot be used to advance an as-applied constitutional challenge

to a statute."). Thus, even considering the potential of Applicant's constitutional claim to stand on an as-applied foundation, it should have been rejected by the Court as not cognizable. And the Court should certainly not have declared Section 273.021(a) of the Election Code to be always, and in every circumstance, facially unconstitutional.

Fourth: Finally, I am concerned that the Court's opinion on original submission did not address or respond to my concern (stated in my dissenting opinion) that it had relied upon, as support for its conclusions, a claim the Court had made in *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002)—one that was demonstrably false, even at the time it was made. The Court's opinion began its discussion of the legal framework, within which this essentially text-of-the-constitution based issue arose, with an emphasis on language from one of its own past opinions, dressing it up along the way with a heading that suggested that its *Saldano* opinion represented no less than "Texas Constitutional History" itself. *See Stephens*, 2021 WL 5917198 at *2–3. The first quote it included from *Saldano* was the following: *"'[t]he office of the Attorney General of Texas has* ***never*** *had authority to institute a criminal prosecution.'"* *Id.* at *3 (quoting *Saldano*, 70 S.W.3d at 880) (emphasis added). But this statement in *Saldano* was demonstrably wrong at the moment it was written.[17]

---

[17] *See Stephens*, 2021 WL 5917198 at *17 (Yeary, J., dissenting) (pointing out that Section 273.021(a) of the Election Code was in existence long before *Saldano* was decided). Section 273.021(a), at that time as it does today, purported to authorize the AG unilaterally to prosecute election law crimes. Indeed, a statutory predecessor to Section 273.021(a) has authorized the AG unilaterally to prosecute election law violations since 1952. *See* Acts 1951, 52nd Leg., ch. 492 (HB 6), § 130(2), p. 1152, eff. Jan. 1, 1952 ("The Attorney General of Texas is hereby authorized to appear before a grand jury and

Had the Court been aware of Section 273.021(a) of our Election Code, and its authorization for the AG to prosecute "criminal offense[s] prescribed by the election laws of this state" when it was deciding *Saldano*, it should have at least mentioned it. But it did not. At that time, no one challenged the constitutionality of that section. And recognition of the existence of Section 273.021(a) would have revealed the falseness of the claim from *Saldano* that the Court substantially relied upon in its opinion on original submission in this case. Instead, the Court would have had to admit that the AG *had in fact* been delegated prosecution authority in at least one narrow set of circumstances: "criminal offense[s] prescribed by the election laws of this state[.]"[18] The Court should not shy away from responding to this

---

prosecute any violation of the election laws of this State by any candidate, election official, or any other person, in state-wide elections, or elections involving two (2) or more counties. He may institute and maintain such prosecution alone or in conjunction with the county or district attorney of the county where such prosecution is instituted.").

[18] For her part, Judge Slaughter believes that I have misread *Saldano*. Dissenting Opinion of Judge Slaughter, at 20 n.88. She apparently believes that, when *Saldano* observed that "[t]he office of attorney general of Texas has never had authority to institute a criminal prosecution[,]" 70 S.W.3d at 878, it only meant that it understood that the Texas Constitution simply would not tolerate any such grant of authority. Such a reading of this passage, however, is quite implausible in light of the dictum that appears shortly after it, in which this Court observed: "The Constitution . . . authorizes the legislature to give the attorney general duties which, presumably, could include criminal prosecution." *Id*. at 880. The directives of the Texas Constitution must not have been so clear to the Court after all, given this later dictum (not to mention this Court's present debate regarding the proper application of the "except in the instances herein expressly permitted" clause of Article II, Section 1, in combination with the "perform such other duties as may be required by law" clause of Article IV, Section 22).

serious charge.[19]

V. CONCLUSION

For all of these reasons, and for the reasons previously stated in my dissenting opinion on original submission, I dissent to the Court's denial of rehearing in this case and to its refusal to grant rehearing, at least on its own motion, to reconsider all of these issues, but especially the demonstrably inappropriate remedy it imposed for the violation it found and whether Stephens even has standing to advance the claim that the AG may not properly represent the state in the proceedings against her.

FILED: September 28, 2022
PUBLISH

[19] The text of the constitution and laws of this state ought to matter more to the Court than statements the Court has made in decisions that have come before, especially when those decisions and statements are shown to be demonstrably incorrect from their inception. *See Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J. concurring) (quoting The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (capitalization omitted)) ("By applying demonstrably erroneous precedent instead of the relevant law's text—as the Court is particularly prone to do when expanding federal power or crafting new individual rights—the Court exercises 'force' and 'will,' two attributes the People did not give it.").