

Nos. PD-0522-21 PD-0523-21  
PD-0524-21 PD-0525-21

**IN THE COURT OF CRIMINAL APPEALS OF TEXAS  
AT AUSTIN**

FILED  
COURT OF CRIMINAL APPEALS  
3/10/2022  
DEANA WILLIAMSON, CLERK

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**EX PARTE ROBBIE GAIL CHARETTE**

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Nos. 14-19-00855-CR 14-19-00856-CR  
14-19-00857-CR 14-19-00858-CR  
In the Fourteenth Court of Appeals  
Houston, Texas

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On Appeal from the 21st District Court  
Washington County, Texas  
Trial Court Cause Nos.  
18345, 18346,  
18347, 18348

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**APPELLANT'S BRIEF ON DISCRETIONARY REVIEW**

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**Lewis Thomas**  
LEWIS THOMAS LAW, P.C.  
State Bar No. 24051423  
14027 Memorial Dr. #392  
Houston, Texas 77079  
Telephone: (281) 513-9880  
Facsimile: (713) 955-9662  
lewisthomaslaw@gmail.com  
*Attorney for Robbie Gail Charette*

**Oral Argument is Respectfully Requested**

## **IDENTIFICATION OF THE PARTIES**

A complete list of the names of all interested parties is provided below.

Trial Judge:	Honorable J. D. Langley, Presiding
Appellant:	Robbie Gail Charette
Counsel for Appellant at Trial and on Appeal:	Lewis Thomas Lewis Thomas Law P.C. 14027 Memorial Drive, No. 392 Houston, Texas 77079
Counsel for the State at Trial and on Appeal	Travis Koehn, Attorney Pro Tem Brandy Robinson Austin County District Attorney's Office 1 E. Main St. Bellville, Texas 77418

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## **STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Appellant Robbie Gail Charette, a former Republican candidate for Judge, was charged with misdemeanor violations of the Election Code and Government Code because of alleged errors made while campaigning. (CR 1.) The violations were alleged to have been committed on or about February 1, 2018 (18345, 18346); February 12, 2018 (18347); and February 26, 2018 (18348). (CR 1.)

In response to complaints by Charette's political opponents, a special prosecutor presented these alleged errors to a Grand Jury, without the referral from the Texas Ethics Commission (TEC) required by Texas Government Code § 571.171.<sup>1</sup> Charette filed an application for pretrial habeas, arguing the special prosecutor had no authority to prosecute the alleged errors, but the trial court denied the motion. (CR 21-27, 58-61.)

After the trial court denied relief, Charette appealed to the Fourteenth Court of Appeals. (CR 63.) The court of appeals' April 20, 2021 panel opinion did not analyze or address Charette's argument that the special prosecutor was without authority to prosecute. *See Charette v. State*, 2021 Tex. App. LEXIS 2927 (Tex. App.–Houston [14th Dist.] April 20, 2021) (unpublished op.). Instead, the court

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<sup>1</sup> The TEC certified that "a diligent search of the records of the Texas Ethics Commission revealed no sworn complaints filed against Robbie Gail Charette." (Supp. CR 3.)

attempted to sidestep the argument by concluding the district court generally had jurisdiction over misdemeanors involving official misconduct. *Id.* at \*7-8.

Charette also argued she was denied due process because she was not provided the usual administrative hearing and rulings or given an opportunity to cure the alleged errors. (CR 24-25; App. Brief at 13-16; App. Reply Brief at 10-13.) The court of appeals concluded, again without analysis or authority, that the denial of Charette's civil due process rights did not deprive the district court of jurisdiction. *Charette v. State*, 2021 Tex. App. LEXIS 2927 at \*7-8. However, Charette was also deprived of criminal due process rights, and the court did not address this deprivation.

On May 5, 2021, Charette moved for rehearing and for *en banc* reconsideration of the April 20, 2021 opinion. The motion was overruled on June 15, 2021.

Charette filed her petition for discretionary review on July 16, 2021. On January 12, 2022, this Court granted the petition.

### **STATEMENT REGARDING ORAL ARGUMENT**

Charette requests oral argument as it will assist the Court in evaluating points of error.

## GROUNDS FOR REVIEW

1. Whether the Fourteenth Court of Appeals erred by affirming the trial court's denial of pretrial habeas because the special prosecutor lacked standing or authority to prosecute alleged misdemeanor violations of the Election Code and Government Code without the referral from the TEC required by Texas Government Code § 571.171?<sup>2</sup>
  
2. Whether the Fourteenth Court of Appeals erred by affirming the trial court's denial of pretrial habeas because Charette was deprived of due process when the District Attorney's office leapfrogged the TEC procedure, which was a prerequisite to prosecution?<sup>3</sup>

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<sup>2</sup> App. Brief at 5-12; App. Reply Brief at 6-10; *Charette v. State*, 2021 Tex. App. LEXIS 2927 at \*7-8.

<sup>3</sup> App. Brief at 13-16; App. Reply Brief at 10-13; *Charette v. State*, 2021 Tex. App. LEXIS 2927 at \*7-8.



## **STATEMENT OF FACTS**

In the March 2018 Republican primary, Appellant Robbie Gail Charette (“Appellant” or “Charette”) was a first-time candidate for county court-at-law in Washington County. As a novice candidate, Charette financed her entire campaign herself and paid political consultants to help with her campaign and the required reporting. Nonetheless, Charette’s political opponents made sure she was indicted for misdemeanor charges arising out of alleged violations of the Election Code and Government Code, specifically: failing to timely file a Personal Financial Statement (“PFS”), failing to properly account for personal expenditures during her campaign, representing in campaign literature that she held the position of judge when she did not, and failing to disclose the true source of a campaign communication. (CR 1.)

These alleged violations were constitutionally and statutorily within the oversight authority of the Texas Ethics Commission (“TEC”), but no TEC complaint was ever filed against Charette. The TEC certified that no sworn complaint existed, and no referral was made to a prosecutor. (Supp. CR 3; 2 RR 26-27.) Instead, Charette’s political opponents complained about the alleged violations to county party officials, and as a result, a special prosecutor was appointed to criminally prosecute Charette. The special prosecutor obtained indictments for the above-referenced misdemeanor charges from a grand jury convened in Washington County. (CR 1.)

None of the procedural protections prescribed by the Government Code or TEC rules were afforded to Charette in this case. The TEC has a sworn complaint process, as well as statutory authority to investigate alleged statutory violations within its jurisdiction on its own motion. Tex. Gov't Code § 571.121 *et seq.* TEC regulations provide a party who is the subject of a complaint the opportunity to resolve a complaint informally, and if no informal resolution can be reached, a formal hearing subject to State Office of Administrative Hearings (“SOAH”) procedures, including the ability to subpoena documents and witnesses and present testimony. Tex. Gov't Code § 571.130. TEC may refer matters for prosecution only upon a vote of its commissioners. Tex. Gov't Code § 571.171(a). Charette was not given an opportunity to resolve any complaint informally; she was not provided a hearing subject to SOAH procedures; and her prosecution was not voted upon by TEC commissioners. (2 RR 26-27.)

## **SUMMARY OF THE ARGUMENT**

The Fourteenth Court of Appeals erred in affirming the trial court's denial of Appellant's application for pretrial habeas. Texas Constitution, Article III, Section 24a, and Texas Government Code assign the TEC the duty to "enforce" certain laws; and each law alleged to have been violated by Charette is within their enforcement authority. Without a referral from the TEC, the special prosecutor lacked the power to proceed to indictment.

In 1991, a constitutional amendment created the TEC, and granted TEC the duties "provided by law." Tex. Const. Art III, sec. 24a. The enabling legislation for the TEC, enacted in 1993, including Government Code § 571.061(a), provided that the "commission shall administer and enforce" Title 15 Election Code violations, and violations of the Government Code, under Chapter 572. Based on this constitutional and statutory language, the organization of the Election Code, and the fundamental due process rights afforded similarly situated defendants, the TEC, rather than the District Attorney, has the primary initial duty to "enforce" the relevant statutes alleged to have been violated in these cases.

The court of appeals concluded that jurisdiction over Charette's indictments properly vested in the district court because the district court generally has jurisdiction over misdemeanors involving official misconduct, but Charette did not argue that the district court lacked jurisdiction. Charette argued that the special

prosecutor lacked authority, without a referral from the TEC, to prosecute the alleged violations. The Fourteenth Court's April 20, 2021 opinion did not analyze or even address this argument.

In addition, Charette's state constitutional rights under the Texas open courts and due process of law constitutional provisions were violated because she did not have the benefit of the full administrative process prior to the criminal proceeding, which is afforded to others similarly situated who are accused of crimes within the jurisdiction of the TEC. Because of the special prosecutor's disregard for the TEC process, Charette lacked the opportunity to contest the charges administratively and cure, if necessary, any issues with the conduct of her campaign. This denial of process substantially and irreparably interfered with Charette's ability to contest the charged conduct, and as a result the indictments should be dismissed.

In response to this issue, the Fourteenth Court held that Charette's civil due process rights did not deprive the district court of jurisdiction. However, again, jurisdiction was not the issue, and Charette was also deprived of criminal due process rights, which the court of appeals did not address. Just as an information or an indictment is a prerequisite to prosecution, and functions as a shield against unfounded and oppressive prosecution, in this case, a referral from non-partisan TEC commissioners was a prerequisite to prosecution. The special prosecutor's prosecution of Charette without a TEC referral was a violation of her due process.

In addition, because Charette's alleged violations were not preliminarily addressed by the TEC, Charette was deprived of her ability to offer as a defense to prosecution any opinion rendered by the TEC regarding her conduct.

The Fourteenth Court of Appeals erred by affirming the trial court's denial of pretrial habeas because the special prosecutor lacked standing or authority to prosecute alleged misdemeanor violations of the Election Code and Government Code without the required referral from the TEC. The Fourteenth Court of Appeals further erred by affirming the trial court's denial of pretrial habeas because Charette was deprived of due process when the District Attorney's office sidestepped this prerequisite to prosecution.

## ARGUMENT

### **I. The special prosecutor lacked standing or authority without the TEC referral required by Texas Government Code § 571.171.**

Appellant was charged with failing to timely file a Personal Financial Statement, failing to properly account for personal expenditures during her campaign, representing in campaign literature that she held the position of judge when she did not, and failing to disclose the true source of a campaign communication. (CR 1.) These alleged violations were constitutionally and statutorily within the oversight authority of the Texas Ethics Commission (TEC). Consequently, the failure to obtain the TEC referral constitutes circumstances that both challenge the State's power to restrain the defendant and raises issues that would bar prosecution. *Ex parte Smith*, 178 S.W. 3d 797, 801 (Tex. Crim. App. 2005). The issues presented are cognizable for pretrial habeas review, contrary to the holding of the Court of Appeals.

The Texas Constitution established the TEC as a non-partisan Legislative Branch agency with commissioners appointed by the Governor from lists composed by both parties. Tex. Const. Art. III, Sec. 24a. The TEC was specifically provided enforcement authority over the sections of the Election Code and Government Code at issue in this case. Tex. Gov't Code §§ 571.094; 571.097.

Chapter 571, Government Code, sets out the organization and duties of the TEC. Tex. Gov't Code § 571.061 provides that the TEC has authority for oversight of certain sections of the code:

Sec. 571.061. LAWS ADMINISTERED AND ENFORCED BY COMMISSION.

(a) The commission shall administer and enforce:

- (1) Chapters 302, 303, 305, 572, and 2004;
- (2) Subchapter C, Chapter 159, Local Government Code, in connection with a county judicial officer, as defined by Section 159.051, Local Government Code, who elects to file a financial statement with the commission;
- (3) Title 15, Election Code; and
- (4) Sections 2152.064 and 2155.003.

*Id.* All of the charges alleged against Charette are within the enforcement authority of the TEC: Texas Election Code §§ 255.004, 255.006, and 254.001 are contained in Title 15 of the Election Code, and are the code sections alleged to have been violated in cause numbers 14-19-00855 (18,345), 14-19-00856 (18,346), and 14-19-00858 (18,348), respectively. Chapter 572 of the Government Code encompasses the requirements of the personal financial statement, the subject of the charge at issue in cause number 14-19-00857 (18,347).

<b>Cause</b>	<b>Alleged Violation</b>	<b>Tex. Gov't Code 571.061(a): The commission shall administer and enforce:</b>
14-19-00855 (18,345)	Texas Election Code § 255.004 <sup>4</sup>	(a)(3) Title 15, Election Code
14-19-00856 (18,346)	Texas Election Code § 255.006 <sup>5</sup>	(a)(3) Title 15, Election Code
14-19-00857 (18,347)	Chapter 572, Texas Government Code <sup>6</sup>	(a)(1) Chapters...572
14-19-00858 (18,348)	Texas Election Code § 254.001 <sup>7</sup>	(a)(3) Title 15, Election Code

The Government Code and TEC regulations prescribe a review process, including preliminary review, informal review, formal review, and referral. The TEC must initiate a preliminary review process upon receiving a sworn complaint. Tex. Gov't Code §§ 571.124-571.1244. A person subject to a complaint (“respondent”) is entitled to notice and an opportunity to respond. *Id.* If no agreed upon resolution can be reached, the parties are entitled to a preliminary hearing. Tex. Gov't Code § 571.125.

The Government Code and TEC regulations further provide for a formal hearing, following a preliminary hearing. The formal hearing is subject to the rights and rules set out in the Administrative Procedure Act, Tex. Gov't Code § 2001.001 *et seq.* and Government Code chapter 571. Tex. Gov't Code §§ 571.129-571.132.

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<sup>4</sup> Cause 14-19-00855. (CR 1.)

<sup>5</sup> Cause 14-19-00856. (CR 1.)

<sup>6</sup> Cause 14-19-00857. (CR 1.)

<sup>7</sup> Cause 14-19-00858. (CR 1.)



The Government Code and TEC regulations specifically provide for a criminal referral only upon the vote of the members of the commission:

INITIATION AND REFERRAL. (a) On a motion adopted by an affirmative vote of at least six commission members, the commission may initiate civil enforcement actions and refer matters to the appropriate prosecuting attorney for criminal prosecution.

Tex. Gov't Code § 571.171.

Texas Government Code § 571.075 provides that “the commission by rule may delegate a power conferred on it by this chapter or another law administered by the commission, *except*: (1) any power requiring a vote of the commission.” *Id.* The legislature intended that the TEC, rather than any other agency, make a determination concerning criminal referral.

Only one of the several chapters in the various code sections referenced in Government Code § 571.061 concerning the TEC provides for enforcement by the District Attorney<sup>8</sup> – and concurrent enforcement authority at that. There is no similar language providing District Attorney initial enforcement authority in any of the other statutes concerning the TEC. As applicable to this case, there is no language enabling a District Attorney to have initial enforcement authority consistent with the State’s allegations in any of the following chapters: Texas Election Code Chapters

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<sup>8</sup> The only such section, Government Code § 305.035(a), provides “The commission, the attorney general, or any county or district attorney may enforce this chapter.” Charette is not alleged to have violated this chapter.

254 and 255 (cause 18345, 18346, and 18348); Texas Government Code Chapter 572, and Texas Local Government Code Chapter 159 (cause 18347). Ultimately, the decision to prosecute criminally is up to the prosecutor, but *only upon referral by the agency*. Tex. Gov't Code § 571.171; *see also State v. Stephens*, 2021 Tex. Crim. App. LEXIS 1994 at \*9 (Tex. Crim. App. Dec. 15, 2021) (“Although the duties of the county and district attorney are not enumerated in article V, section 21, our courts have long recognized that, along with various civil duties, their primary function is to prosecute the pleas of the state in criminal cases.”) (citations omitted).

The TEC's authority is evidenced by the fact that ALL other similar cases have first been resolved administratively. A review of the TEC website, [https://www.ethics.state.tx.us/enforcement/sworn\\_complaints/orders/search/](https://www.ethics.state.tx.us/enforcement/sworn_complaints/orders/search/) (last visited March 4, 2022), shows over 1,500 sworn complaint orders listed on the website over the past thirty years. Meanwhile, there are no reported appeals for any charged criminal violation of any of the statutes alleged in these cases. The State was unable to cite one case supporting its criminal prosecution without a referral involving the code provisions at issue.

In this case, no complaint was ever filed against Charette with the TEC; the TEC certified that no sworn complaint existed, and no referral was made to the special prosecutor. (Supp. CR 3; 2 RR 26-27, CR 26-27.) Consequently, the special prosecutor had no standing or authority to criminally prosecute Charette. The

special prosecutor nonetheless ignored years of precedent from the TEC and proceeded directly to an unheard-of criminal prosecution for these alleged Government and Election code violations, in violation of Charette's substantial rights. The court of appeals erred by failing to evaluate and recognize the TEC's initial and prerequisite enforcement authority.

## **II. Appellant was deprived of due process.**

The prosecution of Charette without a referral from the TEC was also improper because it violated Charette's due process. Charette's alleged violations were not preliminarily addressed by the TEC, and she was consequently deprived of her ability to cure and offer as a defense any opinion rendered by the TEC as to her alleged conduct.

The open court provision in Texas Constitution, Article I, Section 13, provides the following:

**EXCESSIVE BAIL OR FINES; CRUEL OR UNUSUAL PUNISHMENT; OPEN COURTS; REMEDY BY DUE COURSE OF LAW.** Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

*Id.* The Due Process clause, Texas Constitution, Article I, Section 19, provides:

**DEPRIVATION OF LIFE, LIBERTY, PROPERTY, ETC. BY DUE COURSE OF LAW.** No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

*Id.*

Courts of appeals have construed the due course of law provision to be co-extensive with the due process clause. *State v. Vasquez*, 230 S.W.3d 744, 750 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (The Texas due-course-of-law clause generally “does not provide any greater protection than the federal due process clause.”). Thus, the issue may be evaluated under federal law. *See Mann v. State*, 122 S.W.3d 171, 192, n. 97 (Tex. Crim. App. 2003). At a minimum, due process requires a person who may be deprived of a liberty or property interest to be provided notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Anthony v. State*, 209 S.W.3d 296 (Tex. App.—Texarkana 2006); *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 930 (Tex. 1995); *see Zinermon v. Burch*, 494 U.S. 113, 127, 110 S.Ct. 975 (1990); *cf. Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001) (due course of law under the Texas Constitution).

Charette’s liberty interest was implicated because she was criminally indicted without (1) receiving proper notice or the opportunity to respond to the TEC; (2) opportunity for an administrative hearing, both informal and formal, as provided for by statute; or (3) the benefit of a vote of six members of the non-partisan commission prior to referral for criminal prosecution. Charette was not given an opportunity to address any issue administratively, as required preliminary to criminal prosecution. As a result of the State’s hasty prosecution, Charette’s ability to defend herself from

criminal prosecution was impacted. Charette was deprived of the ability she would have otherwise had to cure and offer as a defense any opinion rendered by the TEC as to her alleged conduct. Charette’s ability to protect herself from criminal prosecution was also impacted, as Charette was deprived of the opportunity to have the complaints against her reviewed in a non-partisan manner by TEC commissioners appointed from both parties.

Because the State failed to obtain a referral to prosecute from the TEC, and none of the procedural protections prescribed by the Government Code or TEC rules were afforded to Charette in this case, pretrial habeas is appropriate in this case.

### **III. Pretrial habeas is the appropriate remedy.**

The “extraordinary remedy” of pretrial habeas is directly applicable to this case because the protection of Charette’s substantial rights – the opportunity for a hearing and non-partisan review by the TEC – may only be effectuated by resolving this case through a pretrial writ of habeas corpus.

Generally, “[pretrial] habeas should be reserved for situations in which the protections of the applicant’s substantive rights or the conservation of judicial resources would be better served by interlocutory review.” *Id.* If a claim would be “effectively undermined if not vindicated prior to trial,” pretrial habeas is appropriate. *Ex Parte Perry*, 483 S.W.3d 884, 896 (Tex. Crim. App. 2016) (citing *Abney v. United States*, 431 U.S. 651 (1977)).

As an initial matter, Charette is under restraint by virtue of the indictments and by the bonds set by the trial court. (CR 28-35.) Pretrial habeas is appropriate because it is the only way Charette can adequately protect her due process rights. Charette alleges a valid constitutional right – due process, both statutory and constitutional, was violated in this case.

Charette has demonstrated that the process provided to her was incomplete, as she was not given the opportunity to avail herself of the procedures of the TEC and SOAH proscribed by the Government Code and TEC rules. If Charette is required to go to trial without opportunity for hearing and possible resolution with the TEC, she will have forever lost that opportunity for resolution with the TEC as a potential defense in the instant criminal prosecution. If, in contrast, a referral to the TEC had occurred, the TEC on its own motion could have issued an advisory opinion as to Charette's conduct; *see e.g.*, Tex. Gov't Code § 571.094, 1 Tex. Admin. Code § 8.9, or a written order finding the lack of, or existence of, a particular statutory violation.

Charette will also have forever lost her right to have non-partisan TEC commissioners vote on referral for prosecution.

Requiring Charette to raise these issues post-trial would result in a waste of judicial resources at the trial court level. If Charette's claims are granted, then the cases against Charette must be dismissed. *Ex Parte Weise*, 55 S.W.3d at 619-20.

## **PRAYER FOR RELIEF**

Wherefore, premises considered, Appellant Robbie Gail Charette prays that this Court reverse the judgment of the court of appeals and render judgment dismissing the cases against Appellant because the special prosecutor lacked authority, without a referral by the TEC, to prosecute the alleged violations, and doing so violated Appellant's rights. Alternatively, Appellant requests that this Court remand this cause to the court of appeals for further consideration of the issues. Appellant also prays for all other relief to which she may be entitled.

Respectfully submitted,

LEWIS THOMAS LAW, P.C.

/s/ Lewis Thomas

**Lewis Thomas**

State Bar No. 24051423

14027 Memorial Dr. #392

Houston, Texas 77079

Telephone: (281) 513-9880

Facsimile: (713) 955-9662

lewisthomaslaw@gmail.com

**CERTIFICATE OF SERVICE**

This is to certify that on March 4, 2022, a true and correct copy of this document was transmitted via electronic filing service to the Attorney Pro Tem (travis.koehn@austincounty.gov; brandy.robinson@austincounty.gov) and the State Prosecuting Attorney (information@spa.tex.gov).

/s/ Lewis Thomas  
Lewis Thomas

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Lewis Thomas  
Bar No. 24051423  
lewisthomaslaw@gmail.com  
Envelope ID: 62331612  
Status as of 3/8/2022 11:32 AM CST

#### Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Travis J.Koehn		travis.koehn@austincounty.com	3/4/2022 7:28:24 PM	SENT
Brandy Robinson		brandy.robinson@austincounty.com	3/4/2022 7:28:24 PM	SENT
STATE PROSECUTING ATTORNEY		INFORMATION@SPA.TEXAS.GOV	3/4/2022 7:28:24 PM	SENT