

Nos. PD-1032-20 & PD-1033-20

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In the  
Court of Criminal Appeals

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RECEIVED  
COURT OF CRIMINAL APPEALS  
6/14/2021  
DEANA WILLIAMSON, CLERK

ZENA COLLINS STEPHENS,

*Petitioner,*

v.

THE STATE OF TEXAS,

*Respondent.*

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

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**BRIEF OF *AMICI CURIAE* BRIAN M. MIDDLETON, DISTRICT  
ATTORNEY OF FORT BEND COUNTY; JOE D. GONZALES, CRIMINAL  
DISTRICT ATTORNEY OF BEXAR COUNTY; JOHN COLEMAN  
CREUZOT, CRIMINAL DISTRICT ATTORNEY OF DALLAS COUNTY;  
KIMBRA KATHRYN OGG, DISTRICT ATTORNEY OF HARRIS  
COUNTY; MARK A. GONZÁLEZ, DISTRICT ATTORNEY OF NUECES  
COUNTY; JOSÉ POMPA GARZA, DISTRICT ATTORNEY OF TRAVIS  
COUNTY; AND DELIA AILEEN GARZA, COUNTY ATTORNEY OF  
TRAVIS COUNTY IN SUPPORT PETITIONER ON THE MERITS**

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**STATEMENT OF INTEREST OF AMICI CURIAE**<sup>1</sup>

*Amicus Curiae* Brian M. Middleton, District Attorney of Fort Bend County (268th Judicial District of Texas),<sup>2</sup> joined by *Amici* Joe D. Gonzales, Criminal District Attorney of Bexar County; Kimbra Kathryn “Kim” Ogg, District Attorney of Harris County; John Coleman Creuzot, Criminal District Attorney of Dallas County; Mark A. González, District Attorney of Nueces County (105th Judicial District); José Pompa Garza, District Attorney of Travis County (53rd Judicial District); and Delia Aileen Garza, County Attorney of Travis County (collectively, “*Amici Curiae*”)<sup>3</sup> file this brief in support of Petitioner Zena Collins Stephens (“Stephens”). *Amici* are the elected district attorneys—and county attorney with related misdemeanor authority—chosen by the voters of their county to enforce the

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<sup>1</sup> Pursuant to Texas Rule of Appellate Procedure 11(c), undersigned counsel of record certifies that he authored this brief in whole (consulting with *Amici*), that he has endeavored to add novel arguments rather than merely recite those already advanced, that no party or any party’s counsel authored any part of this brief, and that no other person or entity made a monetary contribution to the preparation of any portion of this brief aside from Fort Bend County and the governmental entities associated with undersigned *Amici*.

<sup>2</sup> The official name of the Fort Bend County District Attorney’s Office is the Office of the District Attorney for the 268th Judicial District. *See* TEX. GOV’T CODE § 43.181(b). Where appropriate, a parallel notation is set out. The Legislature has provided for cross-designation of assistant district and county attorneys in Fort Bend County. TEX. GOV’T CODE §§ 43.181(g) & 45.279(g).

<sup>3</sup> Undersigned counsel of record certifies that he has obtained the permission of *Amici* to affix their electronic signature to this brief.

criminal laws of this State. *Amici* represent approximately 41.5% of the population of this State.<sup>4</sup>

### **STATEMENT OF POSITION**

*Amici* assert that the Texas Constitution of 1876—as has every constitution of this State and the Republic of Texas—empowers only the duly elected or appointed district attorney, criminal district attorney, or county attorney of a county or judicial district to ***initiate*** the criminal prosecutions in this State. Such constitutes those constitutional officers’ ***“exclusive prosecutorial discretion.”*** Relying on a heretofore untested legislative grant, Respondent Attorney General of Texas’s (“Attorney General”) asserted independent prosecutorial authority is an affront to nearly two centuries of Texas legal history. *Amici* support Stephens’s argument that the contrary provision of the Texas Election Code is unconstitutional.

### **STATEMENT OF THE CASE**

Texas Rangers investigated Stephens for alleged campaign-finance violations. In the trial court, Texas Ranger Brad Weatherford testified that he presented the allegations against Stephens to the “Jefferson County D.A.,” [2 RR.75:17-19], who “made the decision that [the Rangers] should go directly to the Attorney General’s

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<sup>4</sup> See TEX. DEMOGRAPHIC CTR., Tex. Population Projections & Estimates, Tbl. 2, available at, [https://demographics.texas.gov/Data/TPEPP/Projections/Report.aspx?id=3d34403746b8453b817969d640339dfa#pnl\\_Output1](https://demographics.texas.gov/Data/TPEPP/Projections/Report.aspx?id=3d34403746b8453b817969d640339dfa#pnl_Output1) (last visited Jun. 4, 2021).

office since they had original prosecution [*sic*],” [2 RR.76:1-3]. The Attorney General’s trial counsel stated that this scenario was “not technically a referral,” [2 RR.76:9]; rather, “as we both have original concurrent jurisdiction—under a hypothetical, we both could have prosecuted it,” [2 RR.76:11-13].<sup>5</sup> The Attorney General’s trial counsel told the trial court that the Jefferson County District Attorney declined to prosecute, [2 RR.76:17-18], but told him, “you ought to go forward,” [2 RR.76:19-21]. The Attorney General’s trial counsel, however, declared that the Attorney General’s “position [is] that regardless of what avenue the Jefferson County District Attorney takes \* \* \* it’s [within] the original jurisdiction of the Attorney General’s office” to prosecute. [2 RR.129:1-5.]<sup>6</sup>

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<sup>5</sup> The context demonstrates that “we both” is a reference to the Attorney General and the Jefferson County District Attorney.

<sup>6</sup> As detailed in *Amici’s* petition-stage brief, at no point has the Attorney General relied on the affirmative consent of the Jefferson County District Attorney as his authority for prosecuting this matter. [*Amici* Pet. Br. at 4 n. 8.] Section 402.028(a) of the Texas Government Code allows a district, criminal district, or county attorney to request “the Attorney General’s assistance in the prosecution of all manner of criminal cases.” On this point, *Amici* and the Attorney General are in agreement. *See* Pet. for a Writ of Mandamus, In re Abbott, 601 S.W.3d 802 (Tex. 2020) (No. 20–0291) 2020 WL 1977356, at \*8 (Tex. Apr. 13, 2020).

Although 402.028(b) suggests deputation, *Amici* detailed how every statute in the Texas Penal Code allows assistance if requested or performed with the consent of the local county or district attorney. [*Amici* Pet. Br. at 24–29.] This case, however, does not directly raise the question of how a local county or district attorney may manifest his or her consent for the Attorney General to prosecute a matter, nor does it raise what the Attorney General must demonstrate to the trial court to demonstrate that he has indeed obtained the appropriate consent. Any indication of affirmative consent (or obviously a judicial order) appearing in a matter’s record should be deemed sufficient to satisfy the consent requirement.

In April 2018, the Chambers County grand jury indicted Stephens on three counts. [CR.155.] Count I alleges that Stephens tampered with a governmental record in violation of § 37.10(a) of the Penal Code “by reporting a \$5,000.00 individual cash contribution in the political contributions of \$50 or less section of said Report.” [CR.155 (emphasis added).] Counts II and III allege that Stephens accepted cash contributions in excess of \$100 from two different individuals in violation of § 253.033(a) of the Election Code. [CR.155.]

On December 24, 2020, *Amici* filed an extensive brief in support of Stephens’s petition for discretionary review. *Amici* continue to stand on their petition-stage brief, and file this merits-stage brief in light of and in response to the arguments made by the Attorney General.

### **SUMMARY OF THE ARGUMENT**

The Legislature vesting the Attorney General with independent authority to initiate the prosecution of any crime in a district or inferior court without the consent of the appropriate local county or district attorney is unconstitutional. The framers of the 1876 Constitution fragmented and decentralized prosecutorial authority. *Saldano v. State*, 70 S.W.3d 873, 877–78 (Tex. Crim. App. 2002). The Constitution’s plain text does not support the Attorney General’s assertion that the

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Here, the record, as constituted, does not contain any competent evidence of the Jefferson County District Attorney’s affirmative consent for the Attorney General’s prosecution either in his place or under his authority to request assistance.

framers' provision of "other duties" allowed the Legislature to usurp the constitutional authority of other officeholders. Creation of the Court of Criminal Appeals, which split the State's judicial power between this Court and the Supreme Court also demonstrates the framer's intent to exclude the Attorney General from independently initiating criminal prosecutions.

Instead, the 1876 Constitution maintains the Attorney General's authority in only the Supreme Court and provides the county and district attorneys with the authority to represent the State in its prosecution of criminal pleas in the district and inferior courts. *See* TEX. CONST. art., 4 § 22 & TEX. CONST. art. 5, § 21. The Attorney General's contrary broad claims of independent prosecutorial authority in the district and inferior courts for election-related criminal prosecutions requires unending contradictions when read with the Penal Code, the Code of Criminal Procedure, and the Government Code. Further, the Attorney General's reliance on his broader civil powers and asserted involvement in criminal appellate matters obfuscate the constitutional question presented—whether the Legislature may provide the Attorney General independent authority to initiate criminal prosecutions. Accordingly, this Court should conclude that contrary legislative provisions purporting to empower the Attorney General to unilaterally make the decision to prosecute—like § 273.021(a) of the Election Code—violate the plain text of the Texas Constitution and the framers' intent.



## ARGUMENT

The provisions of the Texas Election Code providing the Attorney General with independent prosecutorial authority to prosecute criminal violations of the State’s election laws are unconstitutional.”<sup>7</sup> First, the Constitution’s plain text compels the conclusion that only the district and county attorneys may initiate criminal prosecutions. Second, the Attorney General’s reliance on civil prosecutions simply highlights the unanswered question of his source of independent prosecutorial authority under the Texas Constitution. Third, the Attorney General’s appellate criminal representation does not provide him with the authority to initiate criminal prosecutions.

### **I. THE PLAIN TEXT OF THE TEXAS CONSTITUTION PROHIBITS THE LEGISLATURE CONFERRING UPON THE ATTORNEY GENERAL ANY INDEPENDENT AUTHORITY TO INITIATE PROSECUTIONS.**

The Texas Constitution confers on the county and district attorneys the exclusive authority to represent the State in criminal prosecutions in “the District and inferior courts.” TEX. CONST. art. 5, § 21. This Court and the Texas Supreme Court have both declared that the primary function of the district and county

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<sup>7</sup> Section 273.021(a) provides that “[t]he attorney general may prosecute a criminal offense prescribed by the election laws of this state.” TEX. ELEC. CODE § 273.021(a). The commandeering provisions enacted by the Legislature permitting the Attorney General to direct prosecuting attorneys in any of the counties covered by the subject election, TEX. ELEC. CODE §§ 273.002(1) & 273.022, necessarily fail if the Attorney General’s independent prosecutorial authority is unconstitutional.

attorneys is “to prosecute the pleas of the state in criminal cases.” *Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987) (quoting *Brady v. Brooks*, 89 S.W. 1052, 1056 (Tex. 1905)). And this Court noted, “The Legislature may not remove or abridge *a district or county attorney’s exclusive prosecutorial function*, unless authorized by an express constitutional provision.” *Id.* at 254–55 (emphasis added).

**A. Because County and District Attorneys Have Exclusive Authority to Initiate a Criminal Prosecution, That Authority Cannot Be Delegated Elsewhere for a Criminal Offense.**

Article 5, § 21 of the Texas Constitution states:

A County Attorney, for counties in which there is not a resident Criminal District Attorney, shall be elected by the qualified voters of each county, who shall be commissioned by the Governor, and hold his office for the term of four years. In case of vacancy the Commissioners Court of the county shall have the power to appoint a County Attorney until the next general election. The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature.

This provision vests the exclusive authority to represent the State in all county-level criminal prosecutions in the county attorneys, district attorneys, and criminal district attorneys. *Meshell*, 739 S.W.2d at 253–54; *State ex rel. Dishman v. Gary*, 359 S.W.2d 456, 458 (Tex. 1962).

Because the Constitution of 1876 first established the office of county attorney, *compare* TEX. CONST. of 1876 art. 5, § 21 *with* REPUB. TEX. CONST. of

1836 art. IV,<sup>8</sup> TEX. CONST. of 1845 art. 4, TEX. CONST. of 1861 art. 5, TEX. CONST. of 1866 art. 4, and TEX. CONST. of 1869 art. 5, the presumption falls first to that office to perform the State’s “exclusive prosecutorial function.” *Meshell*, 739 S.W.2d at 252–53. And where the Legislature “has not created either a District Attorney or a Criminal District Attorney’s office,” which was the case for Freestone County in *Meshell*, that office represents the State exclusively in all criminal prosecutions. *Id.* at 252–55. Nevertheless, in jurisdictions in which there is also a district attorney (or criminal district attorney), the Constitution’s plain texts expressly allows the exclusive authority of the county attorneys to be divided among the two by the Legislature. Thus, the *exclusive prosecutorial function* for *all* criminal cases falls to the district, criminal district, and county attorneys.

Both as a matter of constitutional and textual interpretation, “all” means “all.” This Court has concluded, “where a particular jurisdiction is given exclusively to a designated court by the constitution, the legislature is prohibited from conferring the same power on another court.” *Ex parte Wilbarger*, 41 Tex. Crim. 514, 519, 55 S.W. 968, 971 (Tex. Crim. App. 1900) (citing cases from other jurisdictions). And this Court has concluded that the State Prosecuting Attorney’s statutory authority to represent the State “in all proceedings before the” Court of Criminal Appeals

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<sup>8</sup> REPUB. TEX. CONST. of 1836, art. IV, *reprinted in* H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1069, 1073–74 (Austin, Gammel Book Co. 1898).

“literally gives the State Prosecuting Attorney authority to represent the State in every case before this Court.” *Aguirre v. State*, 22 S.W.3d 463, 465 (Tex. Crim. App. 1999). This authority over “all” cases positively excludes district and county attorneys from usurping the State Prosecuting Attorney’s authority in this Court and the intermediate courts of appeal. *Ex parte Taylor*, 36 S.W.3d 883, 884 (Tex. Crim. App. 2001) (per curiam).

The “exclusive prosecutorial discretion” in TEX. CONST. art. 5, § 21, *Meshell*, 739 S.W.2d at 253–54, is indistinguishable from “all.” It similarly excludes the Attorney General from usurping the exclusive authority of the district and county attorneys to initiate criminal prosecutions. The office of district attorney has appeared in every constitution of Texas. REPUB. TEX. CONST. of 1836 art. IV, § 5;<sup>9</sup> TEX. CONST. of 1845, art. 4 § 12; TEX. CONST. of 1861, art. 4 § 12; TEX. CONST. of 1866, art. 4 § 14 & TEX. CONST. of 1869, art. 5 § 12. The First Legislature invested each district attorney with the duty “to conduct all prosecutions for crimes and offenses cognizable in such [district] court.”<sup>10</sup> The term “all” appears again.<sup>11</sup>

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<sup>9</sup> REPUB. TEX. CONST. of 1836, art. IV, § 5, *reprinted in* H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1069, 1074 (Austin, Gammel Book Co. 1898).

<sup>10</sup> Act approved May 13, 1846, 1st Leg., R.S., § 2, 1846 Tex. Gen. Laws 295, 296, *reprinted in* H.P.N. GAMMEL, *2 The Laws of Texas 1822–1897*, at 1601–02 (Austin, Gammel Book Co. 1898).

<sup>11</sup> Although such is a legislative pronouncement, statutes enacted around constitutional ratification are entitled to substantial deference. *Hill Cnty. v. Sheppard*, 178 S.W.2d 261, 263 (Tex. 1944) (Where a “statute was enacted by the Legislature near the time when the Constitution containing the same term was

**B. To Avoid this Conclusion, the Attorney General Obfuscates Executive and Judicial Power and Misreads this Court’s Precedents.**

Pointing to his constitutional authority to “perform such other duties as may be required by law,” TEX. CONST. art. 4, § 22, the Attorney General asserts that the “natural overlap” between functions of the executive and judicial departments, [Att’y Gen. Br. at 10–14], authorizes the Legislature to grant any authority vested in locally elected prosecutors under TEX. CONST. art. 5, § 21. Additionally, the Attorney General presents *dicta* from this Court’s prior decisions as determinative. All of this, unfortunately, takes a bit of explanation to debunk.

1. *Blurred Lines Do Not Create Constitutional Power.*

The statutory history of the Office of the State Prosecuting Attorney being extensive detailed in *Amici’s* petition-stage brief, [Amici Pet. Br. at 17–18 & 36–38], caused the Attorney General to assert that such reflects the “often-blurred line between the judicial and executive branches.” [Att’y Gen. Br. at 15.] In *Saldano v. State*, this Court just presumed, in discussing the Attorney General’s pre-1923 involvement in criminal appeals, that a statutory delegation was proper. 70 S.W.3d at 880 (citing Act of Mar. 30, 1923, 38th Leg., R.S., ch. 156, § 4, 1923 Tex. Gen. Laws 335, 335). This Court did not acknowledge that it would be permissible for the Legislature to give the Attorney General the power to prosecute crimes, *id.* at

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adopted by the people, the Act of the Legislature carries great weight in determining what was meant by the use of the same term in the Constitution.”).

878–80, and noted that the long-time tradition of Attorney General’s representation of the State before the United States Supreme Court does not have the effect of granting authority to do so, *id.* at 881.

If blurred lines could create power, it would render the Texas Constitution a nullity. Any blurring of lines, past and present,<sup>12</sup> by the Legislature only speaks to the absence of a prior justiciable challenge and the essential need to have this Court resolve the weighty constitutional dispute here.

Rather, it is incumbent on counsel to recognize *dicta*. In *Saldano*, this Court in fact wrote, “Under our state law, only county and district attorneys may represent the state in criminal prosecutions.” 70 S.W.3d at 880 (quoting *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 930 (Tex. Crim. App. 1994) (plurality op.)). A non-determinative issue discussed in passing, however, as such was there, provides no precedential approval. *Cf. Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute

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<sup>12</sup> See e.g., *Shepperd v. Alaniz*, 303 S.W.2d 846, 849–50 (Tex. Civ. App.—San Antonio 1957, no pet.) (discussing application of article 9.02 of the Vernon’s Texas Election Code, which authorized the Attorney General to prosecute election violations, in relation to a 1956 dispute between the locally elected prosecutor and the Attorney General); TEX. ELEC. CODE § 273.021(a) (“The attorney general may prosecute a criminal offense prescribed by the election laws of this state.”).

precedents.”). *Saldano* informs but does not answer the constitutional question presented, *see infra* II.C.

2. *Classifying the Duties of District and County Attorneys as Executive Does Not Create as a Corollary that the Attorney General May Thereby Exercise Judicial Power.*

The Attorney General reads *Meshell* as holding that because district and county perform executive functions, the Texas Constitution allows the Legislature to assign judicial functions to the Attorney General. [Att’y Gen. Br. at 13.] This, despite *Meshell*’s repeated use of “exclusive prosecutorial function” being assigned to the district and county attorneys. 739 S.W.2d at 252–55.

In *Meshell*, this Court invalidated the Texas Speedy Trial Act. *Id.* at 254–58. Rather on point for this matter, this Court required an “express constitutional provision” for the Legislature to constitutionally “remove or abridge a district or county attorney’s exclusive prosecutorial function.” *Id.* at 254–55 (emphasis added). Even though the Texas Constitution as then interpreted by this Court granted the Legislature “ultimate control over [the] establishment of procedural rules of court,” *id.* at 255, this Court concluded that the Speedy Trial Act deprived the county attorney of “his exclusive prosecutorial discretion in preparing for trial,” *id.* at 256 (emphasis added).<sup>13</sup> As the Legislature did not have constitutional authorization to

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<sup>13</sup> In *Meshell*, this Court acknowledged a defendant’s state and federal constitutional right to a speedy trial. *Id.* at 256. This Court concluded that the Speedy Trial Act interfered with the county attorney’s prosecutorial discretion

interfere with the county attorney’s “exclusive prosecutorial discretion in preparing for trial,” this Court invalidated the Act as unconstitutional. *Id.* at 257.

Instead of supporting the Attorney General, *Meshell* supports *Amici’s* position, *see supra* I.A. Vesting “exclusive prosecutorial discretion” with an actor outside the confines of TEX. CONST. art. 5, § 21 necessarily interferes with said actor’s “exclusive prosecutorial discretion.” *Cf. Meshell*, 739 S.W.2d at 252–55. Like in *Meshell*, the question of whether the Legislature had the constitutional authority to interfere with the prosecutorial discretion of a district, criminal district, or county attorney is the determinative question. And the answer is both simple and settled: if only local prosecutors have exclusive authority, that authority cannot simultaneously be shared by the Attorney General.

**II. THE ATTORNEY GENERAL’S CIVIL CONSTITUTIONAL AUTHORITY DOES NOT SUPPORT THE LEGISLATURE CONFERRING UPON HIM ANY PORTION OF THE DISTRICT AND COUNTY ATTORNEYS’ EXCLUSIVE PROSECUTORIAL DISCRETION.**

Relying on his broader civil powers and prior involvement in criminal appeals that predate this Court, the Attorney General does not assert a constitutional basis for the Legislature investing him with the independent authority to initiate a criminal prosecution. Instead, the Attorney General relies on the difficulties of drawing an

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because it did not give “any consideration for the factors used in determining whether appellant has been deprived of his constitutional right to a speedy trial.” *Id.* Rather, the Act was “directed at speeding the *prosecutor’s preparation and ultimate readiness for trial.*” *Id.* at 255 (emphasis in original).



elegant line between the Executive and Judicial departments to advocate for no line at all between his office and that of the district and county attorneys. [Att’y Gen. Br. at 8–17.]

The Attorney General obfuscates the principal issue in two main respects. First, the Attorney General relies on dozens of decisions approving of legislative enactments that vested independent and primary representation of the State in the district and inferior courts under civil causes of action. [Att’y Gen. Br. at 12–14.] But such only begs the question of the Attorney General’s constitutional authority to initiate criminal prosecutions. Second, the Attorney General notes a few instances in which his office has controlled a criminal appellate matter before this Court. [*Id.* at 14–16.] As *Amici* discuss below, *infra* III, the Attorney General’s assertion also does not directly address the constitutional source of the Attorney General’s authority to initiate independently a criminal prosecution or exercise any independent prosecutorial discretion.

**A. Civil Litigation Authority Over Certain Causes of Action Does Not Confer Criminal Prosecution Power.**

The Attorney General contends that his authorized appearance in court as a representative of the State in some matters means that he also has the authority to represent the State in criminal prosecutions in district and inferior courts. [Att’y Gen. Br. at 12–14.] As demonstrated, *supra* I.A., this is in direct conflict with the

division of judicial power expressly provided to locally elected prosecutors by TEX. CONST. art. 5, § 21.

Additionally, the statement in *Brady v. Brooks* that the Attorney General performs executive and judicial functions is consistent with this understanding. 89 S.W. 1052, 1055–56 (Tex. 1905). The context makes clear that the Supreme Court’s acknowledgement of the Attorney General’s judicial duties referred to his potential role as a civil prosecutor in new causes of action established by the Legislature that grant him exclusive authority. *Id.*; see also *Meshell*, 739 S.W.2d at 254 (“the Supreme Court did hold<sup>14</sup> that the Legislature could create new causes of action in favor of the state and lodge the exclusive duty to prosecute such suits in the office of the Attorney General. *Brady, supra.*”). Implicit in *Brady* is the notion that any new cause of action cannot include actions previously assigned to county and district attorneys. Further, *Brady* is limited by its terms to civil matters and therefore does not support any encroachment into the realm of trial-court criminal prosecutions. The initiation of a criminal prosecution, regardless of the offense type or its effective date, should not be regarded as a new cause of action that can be exclusively or concurrently delegated to the Attorney General. Indeed, the Attorney General has

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<sup>14</sup> Because this statement was not controlling to the outcome of the case, it was not truly a holding and thus should be read as *dicta*.

cited no case from this Court or the Texas Supreme Court that equates a criminal offense with a new cause of action.<sup>15</sup>

**B. This Court Should Reject the Attorney General’s Attempt to Engraft His Authority to Prosecute Criminal Matters onto His Authority to Prosecute Civil Matters.**

Being shut out of TEX. CONST. art. 5, § 21, the Attorney General points to the numerous instances in which the Legislature or the Texas Supreme Court has expanded his authority in *civil* matters. *Amici* acknowledged some of these in their petition-stage brief. [*Amici* Pet. Br. 14–15 & 22–23.]

And it is true that “[t]his constitutional provision \* \* \* does not preclude the Legislature, pursuant to the authority delegated to it under Article IV, Section 22, from empowering the Attorney General to likewise represent the State in district court.” *El Paso Elec. Co. v. Texas Dep’t of Ins.*, 937 S.W.2d 432, 438 (Tex. 1996) (citing *Brady*, 89 S.W. at 1055) (emphasis added). In *El Paso Elec. Co.*, the Supreme Court upheld the Attorney General’s authority to assist a receiver in prosecuting claims on behalf of an insurer’s estate. *Id.* at 439. The Attorney General additionally notes several other civil matters in which the Supreme Court approved of the

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<sup>15</sup> In the trial court, the Attorney General expressly acknowledged the lack of such authority. [CR.114-15 (“neither the Supreme Court nor the Court of Criminal appeals [*sic*] have squarely held that the Attorney General may be required to prosecute a criminal matter in trial courts”).] The trial court agreed. [2 RR.106:16-20 (“And in this case, I think we’ve all agreed throughout this whole process that this is almost a case of first impression throughout the State so that they’ve never had a need to address it one way or the other.”).]

Legislature authorizing the Attorney General to prosecute a new or additional cause of action in the State's favor. [Atty's Gen. Br. at 12 (quoting *Smith v. State*, 328 S.W.2d 294, 295 (Tex. 1959) (per curiam).] All of this, however, only begs the question of the Attorney General's constitutional authority to initiate criminal prosecutions.

TEX. CONST. art. 4, § 22 provides:

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

TEX. CONST. art. 4, § 22's specific clause empowering the Attorney General to take actions in the courts regarding private corporations explains the Supreme Court cases cited in the preceding paragraph.

To construe a constitutional provision, this Court is "principally guided by the language of the provision itself as the best indicator of the intent of the framers who drafted it and the citizenry who adopted it." *Johnson v. Tenth Jud. Dist. Ct. of*

*Appeals at Waco*, 280 S.W.3d 866, 872 (Tex. Crim. App. 2008).<sup>16</sup> Following the framers’ intent, early Supreme Court cases protected the Attorney General’s exclusive civil authority from legislative expropriation in favor of local governmental attorneys.

*Brady*, which involved tax collection and penalty assessment for failure to pay said taxes against two corporations, 89 S.W. at 1053, constitutes a suit under legislation promulgated under TEX. CONST. art. 4, § 22’s grant of civil authority to the Attorney General. Numerous other examples exist. *See, e.g., State v. Int’l & G. N. Ry. Co.*, 35 S.W. 1067, 1068 (Tex. 1896) (“attempts to confer upon the district and county attorneys authority to institute a proceeding in the name of the state against a corporation \* \* \* ‘exercises power not conferred by law’ thereby rendering such unconstitutional); *State v. Paris Ry. Co.*, 55 Tex. 76, 80 (1881) (Lamar County Attorney’s suit seeking to enjoin railroad construction unauthorized “as it did not purport to be instituted under the authority of the attorney general”).

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<sup>16</sup> The Attorney General does not contest *Amici’s* delineation of the philosophical outlook of the constitutional convention and the historical context illuminated by state constitutions in place before 1876. [*Amici* Pet. Br. at 10–16.] Nevertheless, it is worth repeating that the 1876 Constitution rescinded the Attorney General’s authority to “instruct and direct the official action of the District Attorneys” regarding fines and public moneys collected by suit. *Compare* TEX. CONST. of 1876 art. 4, § 22 *with* TEX. CONST. of 1869 art. 4, § 23. Such demonstrates that the framers’ of the Texas Constitution knew how to grant the Attorney General authority to direct local prosecutors, and they knew how to take that authority away as they did in the 1876 Constitution.

These decisions merely affirmed the framers' intent regarding the Attorney General's civil authority. The *Brady* court actually "gravely doubted" whether the Legislature could divest the district or county attorney "in whole or in part" of his manifest "section 21 of article 5" duty "to prosecute the [criminal] pleas of the state." 89 S.W. at 1057.

The Attorney General, faced with a textual limitation to criminal prosecution, advocates for a sweeping and liberal interpretation his constitutional duty "to perform such other duties as may be required by law," TEX. CONST. art. 4, § 22, which he refers to as the "other duties" clause, [Att'y Gen. Br. 18–22]. The "other duties" clause, however, remained unchanged from the 1869 Constitution. Compare TEX. CONST. of 1876 art. 4, § 22 with TEX. CONST. of 1869 art. 4, § 23. So the 1876 Constitution's diminution of the Attorney General's authority, *supra* n. 16, belies the Attorney General's limitless interpretation of the "other duties" clause. As does the Attorney General's failure to support his argument with authority from the historical record surrounding ratification. *Cf. Holder v. State*, 595 S.W.3d 691, 701 n. 17 (Tex. Crim. App. 2020) (analyzing the historical record to discern the framers' intent).<sup>17</sup>

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<sup>17</sup> Even further afield, the Attorney General asserts that if the "district and county attorneys are exclusively members of the judicial branch, exercising exclusively judicial power, it is *their* involvement in election-related litigation (and not the Attorney General's) that raises separation-of-powers concerns." [Att'y Gen. Br. at 22 (emphasis in the original).] Since elections represent the state's political

C. **The 1876 Constitution’s Division of the Authority for Final Review of Civil and Criminal Law Additionally Limits the Attorney General’s Constitutional Authority to the Former Rather than the Latter.**

The Attorney General’s express authority “represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party,” TEX. CONST. art. 4, § 22, also indicates an express constitutional limitation of the Attorney General’s authority to civil matters. At ratification, both the Court of Appeals and the Supreme Court exercised appellate jurisdiction co-extensive with the limits of the State. TEX. CONST. of 1876 art. 5, §§ 3, 6. The 1876 Constitution vested the Supreme Court with appellate jurisdiction over “civil cases of which the district courts have original or appellate jurisdiction.” TEX. CONST. of 1876 art. 5, § 3 (emphasis added). The 1876 Constitution conferred upon the Court of Appeals appellate jurisdiction “in all criminal cases, of whatever grade, and in all civil cases, unless hereafter otherwise provided by law, of which the County Courts have original or appellate jurisdiction.” TEX. CONST. of 1876 art. 5, § 6 (emphasis added).<sup>18</sup>

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power and “belong to the political branch of the government,” [*id.* at 21 (quoting *City of Austin v. Thompson*, 219 S.W.2d 57, 59–60 (Tex. 1949))], the Attorney General posits that this and other election-related litigation is beyond the control of judicial power, [*id.* at 22].

<sup>18</sup> In 1891, the electorate amended the Constitution to establish the intermediate civil courts of appeal. TEX. S.J.R., 22nd Leg., R.S., 1891 Tex. Gen. Laws 197, 198–99, *reprinted in* H.P.N. GAMMEL, 10 The Laws of Texas 1822–1897, at 200–01 (Austin, Gammel Book Co. 1898); TEX. CONST. art. 5, § 6 (added 1891). The Court of Appeals’s name changed to the Court of Criminal Appeals and it lost its already-

The 1876 Constitution vested the Attorney General with express authority to “represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party.” TEX. CONST. of 1876 art. 4, § 22. At the same time, the 1876 Constitution stripped the Supreme Court of its jurisdiction over criminal matters. *Compare* TEX. CONST. of 1876 art. 5, § 3 *with* REPUB. TEX. CONST. of 1836 art. IV, § 8;<sup>19</sup> TEX. CONST. of 1845 art. 4, § 3; TEX. CONST. of 1861 art. 5, § 3; TEX. CONST. of 1866 art. 4, § 3; and TEX. CONST. of 1869 art. 5, § 3. Despite this significant change, the 1876 Constitution did not confer a mirroring provision on the Attorney General for the Court of Appeals. The 1876 Constitution’s use of the phrase “all criminal cases, of whatever grade” and lack of express assignment to the Attorney General indicates that the Attorney General was not a player in criminal prosecutions at ratification. TEX. CONST. of 1876 art. 5, § 6.

Rather, “the attorney general \* \* \* has no criminal prosecution authority \* \* \* .” *Pirtle*, 887 S.W.2d at 930 (*dicta* from plurality op.). The San Antonio Court of Appeals—considering the predecessor to the very statute at issue here—barred the Attorney General from prosecuting without the district attorney’s consent.

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truncated civil jurisdiction. *Id.* at 197, 198, 10 GAMMEL at 199–200; TEX. CONST. art. 5, § 5 (amended 1891). Undoubtedly, the Legislature that passed the proposed constitutional amendments for voter approval was well aware that the 1876 Constitution limited the Attorney General to representing the State in the Supreme Court.

<sup>19</sup> REPUB. TEX. CONST. of 1836, art. IV, § 8, *reprinted in* H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1069, 1074 (Austin, Gammel Book Co. 1898).



*Shepperd*, 303 S.W.2d at 849–50 (quoting *Brady*). Although the district attorney had already initiated criminal prosecution in *Shepperd* and the Attorney General later filed an identical prosecution in another county, nothing in *Shepperd* supports a different result had the Attorney General initiated the prosecution first. Because “[i]t has always been the principal duty of the district and county attorneys to investigate and prosecute the violation of all criminal laws, including the election laws,” the Legislature may not take away these duties and give them to others. *Id.* at 850.

It is certainly true that the Attorney General now has broader affirmative civil litigation authority than at ratification. The Attorney General documents the Legislature’s augmentation of his TEX. CONST. art., 4 § 22 civil authority, [Att’y Gen. Br. at 12–14], as the operations of state government have—in step with numerous constitutional amendments—expanded beyond its scope in 1876. *State v. Thomas*, 766 S.W.2d 217, 219 (Tex. 1989) (noting proliferation of administrative agencies since 1876).<sup>20</sup> This augmentation of the Attorney General’s affirmative

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<sup>20</sup> Beyond the scope of the constitutional issue presented in this case, the creation of administrative agencies also exemplified the framers’ deliberate decentralization of authority in the executive department. *See Saldano*, 70 S.W.3d at 877 n. 11 (noting independence of commissions and agencies). In turn, the exercise of authority by these agencies and commissions raised significant constitutional issues respecting their adjudicative authority. *See, e.g., State v. DeSilva*, 145 S.W. 330, 333 (Tex. 1912) (liquor-license revocation proceeding is not an assertion of “judicial” power); *Bd. of Water Eng’rs v. McKnight*, 229 S.W. 301, 307 (Tex. 1921) (determining water rights in the Pecos River is an assertion of “judicial” power). To

civil litigation authority since ratification, however, bears little relevancy on the constitutional question presented in this case because he has never had the constitutional authority to initiate independently a criminal prosecution.<sup>21</sup>

### **III. APPELLATE JURISDICTION UNDERCUTS RATHER THAN SUPPORTS THE ATTORNEY GENERAL’S PURPORTED AUTHORITY TO INITIATE A CRIMINAL PROSECUTION.**

Although the Attorney General’s long-ago involvement in criminal appeals is not particularly relevant,<sup>22</sup> today’s appellate procedure rules are. The Code of Criminal Procedure requires the consent of the district, criminal district, or county attorney before the state may file a notice of appeal. TEX. CODE CRIM. PROC. art.

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allow the Attorney General to exercise his executive authority to represent the State in said agencies, the Supreme Court construes the Attorney General’s TEX. CONST. art., 4 § 22 enumerated authority “to take such action in the courts” by defining “‘courts’ in a generic sense to refer to an adjudicative forum \* \* \* regardless of whether the label attached to that forum is ‘court’ or ‘agency.’” *State v. Thomas*, 766 S.W.2d 217, 219 (Tex. 1989) (allowing Attorney General to intervene on behalf of consumer state agencies before the Public Utility Commission).

<sup>21</sup> Count I charges felony tampering with a governmental record in violation of § 37.10(a) of the Texas Penal Code. *Amici* stand on the argument contained in the petition-stage brief that the trial court correctly determined that tampering with a public record is not an election-related crime. [*Amici* Pet. Br. 31–33.]

<sup>22</sup> *Amici*’s petition-stage brief asserted that because the Constitution prohibited nearly all appeals by the State in criminal matters until 1987, the representative of the State in such proceedings is not particularly insightful to discerning the framers’ intent regarding the official empowered with prosecutorial discretion. [*Amici* Pet. Br. at 17–18.] Rather than address that argument, the Attorney General disagrees with *Amici*’s assertion that a nineteenth-century gubernatorial appointment was the precursor to the State Prosecuting Attorney. [*Amici* Pet. Br. at 17–18, 37 n. 52; Att’y Gen. Br. at 15.] These questions are tangential to this matter’s main constitutional question.

44.01. The Code of Criminal Procedure grants the “prosecuting attorney” twenty days to file a notice of appeal. TEX. CODE CRIM. PROC. art. 44.01(d); TEX. R. APP. P. 26.2(b). The Code of Criminal Procedure defines the “prosecuting attorney” as “the county attorney, district attorney, or criminal district attorney who has the primary responsibility of prosecuting cases in the court hearing the case and does not include an assistant prosecuting attorney.” TEX. CODE CRIM. PROC. art. 44.01(i). Coincidentally, these three local officials are the same as those enumerated in the Texas Constitution. *Compare* TEX. CONST. art. 5, § 21 *with* TEX. CODE CRIM. PROC. art. 44.01(i).

Thus, these provisions undermine a grant of independent criminal prosecutorial authority to the Attorney General. The Attorney General fails to explain how his supposed authority to initiate criminal prosecutions in the “District and inferior courts” is effective if he cannot lawfully appeal adverse trial-court rulings enumerated in sections (a) and (b) of article 44.01—a principle well illustrated by this very case.<sup>23</sup> Here, the trial court dismissed Count I of the Indictment, which alleges that Stephens tampered with a governmental record in

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<sup>23</sup> For purposes of appellate jurisdiction, the court of appeals’s holding rests on an implicit assumption that § 273.021(a) converted the Attorney General into an official authorized to appeal on behalf of the State. Since actions of an attorney *pro tem* are voidable rather than void, an action by an improper official still invokes the appellate jurisdiction of the courts of appeal. *See State v. Newton*, 158 S.W.3d 582, 590 (Tex. App.—San Antonio 2005, pet. dismissed).

violation of § 37.10(a) of the Penal Code. [CR.179-80.] The “state is entitled to appeal an order of court in a criminal case [that] dismisses an indictment \* \* \* or any portion of an indictment.” TEX. CODE CRIM. PROC. art. 44.01(a)(1).<sup>24</sup> The Attorney General appealed the trial court’s order under the authority of that provision. [CR.181-82 (citing TEX. CODE CRIM. PROC. art. 44.01(a)(1)).] The filed notice of appeal, however, was not made by the “prosecuting attorney,” which here would seemingly be the Jefferson County District Attorney. [CR.181-82.]<sup>25</sup> The fact that the Attorney General’s prosecution of the appeal here emanated from a failure to follow the Code of Criminal Procedure further supports *Amici’s* arguments.<sup>26</sup>

#### **IV. AMICI’S PETITION-STAGE BRIEF ACCURATELY DESCRIBED THE DEPUTATION OF AN ASSISTANT ATTORNEY GENERAL IN AN ELECTION-RELATED PROSECUTION.**

This matter raises complicated doctrinal questions of first impression—the disposition of which will have far-reaching consequences. Under such

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<sup>24</sup> Texas Rule of Appellate Procedure 25.2(a)(1) simply adopts article 44.01 of the Texas Code of Criminal Procedure.

<sup>25</sup> The trial court implicitly recognized this quandary: “[I]f I quash the indictment and you appeal it and they raise the jurisdictional issue on the appeal? Instead of the First and Fourteenth Court, it should be in the Ninth where the original jurisdiction should have been in the first place. This doesn’t end, you see.” [2 RR.131:3-7.]

<sup>26</sup> It also demonstrates that *Saldano’s* holding is limited to the Attorney General representing the state in the Supreme Court of the United States. *See Saldano*, 70 S.W. 3d at 875–84. The Texas Code of Criminal Procedure does not apply there.

circumstances, even the most accomplished counsel will engage in unnecessarily heated rhetorical attacks on other counsel.

The Attorney General asserts that *Amici's* petition-stage brief falsely stated that the Rockwall County District Attorney deputized the assistant attorney general who prosecuted the *Medrano* matter. [Att'y Gen. Br. at 14 n. 1 (citing [*Carlos Medrano v. State*, 421 S.W.3d 869 (Tex. App.—Dallas 2014, pet ref'd)] (Appeal Court Case No. 05-12-00316-CR) & *Amici* Pet. Br. at 31 n. 48.)] However, the then-appointed assistant attorney general stated to the trial court: “The distinction in [*Medrano*] was, I believe, the Attorney General was deputized. So that particular D.A. retains authority when they're deputized.” [2 RR.149:21-24.]

Court records provided to undersigned counsel of record then supported *Amici's* qualified statement that Rockwall County District Attorney Kenda L. Culpepper deputized Assistant Attorney General Jonathan White for each case arising out of the charged multi-defendant election-fraud scheme even though not all documentation survived. [*Amici* Pet. Br. at 31 n. 48.]<sup>27</sup> Undersigned's further investigation into the *Medrano* appellate record provides additional support—all

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<sup>27</sup> *Assuming arguendo* that *Amici* may even submit material into this matter's record and such is even necessary, undersigned counsel move this Court, pursuant to Texas Rule of Evidence 201(c)(2), for the selected self-authenticated court documents set out in the Appendix to be judicially noticed. It is not even clear that deputation presented in the Appendix would have been limited to just the matter for which it was entered. *See Pirtle*, 887 S.W.2d at 942 (Baird, J., dissenting).

excerpts of the supporting official court records are set out in an Appendix to this brief.

Carlos Medrano appealed his conviction from Cause No. 2-11-418 (Rockwall Cnty. 439th Dist. Ct. Feb. 27, 2012) [No. 05-12-00316-CR, *Medrano* CR.167; Appendix at 4], which the Fifth Court of Appeals affirmed, *Medrano*, 421 S.W.3d 869.<sup>28</sup> The trial court sentenced Ronaldo Medrano in accordance with a plea agreement. *See* Cause No. 2-11-416 (Rockwall Cnty. 439th Dist. Ct. Feb. 29, 2012).

Culpepper deputized White in the Ronaldo Medrano matter. [Appendix at 1.] Turning to the official court records for the Carlos Medrano matter, the “Attorney” for “The State of Texas” is listed as Kenda Culpepper, who was and is the elected district attorney in Rockwall County. [No. 05-12-00316-CR, *Medrano* CR.7; Appendix at 3.]<sup>29</sup> White represented the State in the Carlos Medrano matter. [*Id.* at

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<sup>28</sup> In *Medrano*, the Fifth Court of Appeals adopted the Attorney General’s position on the constitutional questions raised by this matter in full. The *Medrano* court did not consider the framers’ intent of exclusivity in drafting TEX. CONST. art. 5, § 21, distinguish between criminal and civil authority of the local prosecutors and the Attorney General, or analyze whether the “other duties” clause of TEX. CONST. art. 4, § 22 contained any limiting principles. 421 S.W.3d at 878–81. These analytical mistakes distinguish *Medrano* every bit as much as the deputation issue.

Citing *Medrano* to concede the obvious in *Amici*’s petition-stage brief, [*Amici* Pet. Br. at 30–31 & n. 48], *Amici* make clear that they support reforming § 273.021(a) of the Texas Election Code to provide the Attorney General consent-based concurrent jurisdiction like every provision in the Texas Penal Code. [*See Amici* Pet. Br. at 24–29.] As is true in these provisions, the local district or county attorney who gives consent must be a county connected to the offense.

<sup>29</sup> The Jefferson County District Attorney does not appear anywhere in the Clerks Record. Nor does the Chambers County District Attorney, foreclosing any

CR.167; Appendix at 4.] White also represented the State in the Ronaldo Medrano matter as well as the numerous related matters coordinated before the 439th District Court. [*Id.* at 1 SRR.5:6-7 & 9-14; Appendix at 8:6-7 & 9-14.]

In 2011, when White executed the deputation in the Ronaldo Medrano matter, the Rockwall County Clerk’s Office did not keep court records electronically. [*See id.* CR.7; Appendix at 3 (handwritten docket sheet).] It is not an unreasonable inference to surmise that the clerk’s office misplaced the documentation in transitioning to electronic recordkeeping.

The Attorney General also requests *Amici* explain how the Rockwall County District Attorney prosecuted the Medrano matters when the predicate crimes occurred in Dallas County—outside of her jurisdiction. [Att’y Gen. Br. at 14 n. 1.] The latter question attributes an argument to *Amici* not contained in *Amici*’s petition-stage brief: election-related crimes must always be prosecuted in the county of the alleged criminal conduct. Venue is not one of the questions for which this granted Stephens’s petition for review but the identity of the prosecuting attorney is. *See* Pet. for Discretionary Rev., *State v. Stephens*, 608 S.W.3d 245, 249 (Tex. App.—Houston [1st Dist.] 2020, pet. granted, Feb. 10, 2021) (Nos. PD-1032-20 & PD-1033-20) (Tex. Crim. App. Dec. 9, 2020). Further, *Amici*’s petition-stage brief does

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argument that the Jefferson County District Attorney designated the Chambers County District Attorney as a “special prosecutor.”

not attack the constitutionality of § 273.024 of the Texas Election Code. Venue outside the county of an alleged offense departs from the constitutional norm, but is not *per se* unconstitutional. *See, e.g.*, TEX. TAX CODE §152.105(2). Rather, *Amici* attack the Attorney General’s construction of the officeholder who makes such determinations.

As to District Attorney Culpepper’s authority to deputize assistant attorney generals for the *Medrano* matters, not even *Medrano*’s appellate record definitively answers the question. “[F]or reasons not set out clearly in the record, the case was not being prosecuted in Dallas County.” *Medrano*, 421 S.W.3d at 880. Since appellate counsel do not have to request the entire reporter’s record, *see* TEX. R. APP. P. 34.6(c), *Amici* cannot answer the Attorney General’s question with certainty. Culpepper may have been formally designated as an attorney *pro tem*, TEX. CODE CRIM. PROC. 2.07, or the then-serving district attorney of Dallas County—a predecessor of a signer of this brief—designated her as a “special prosecutor.” The appointment of a “special prosecutor” arises out of article 2.01 of the Code of Criminal Procedure and “is *permitted by the elected district attorney* to participate in a particular case to the extent allowed by the prosecuting attorney, without being required to take the constitutional oath of office. *State v. Rosenbaum*, 852 S.W.2d 525, 529 (Tex. Crim. App. 1993) (Clinton, J., concurring) (emphasis in the original).



And D.A. Culpepper did serve as an assistant district attorney for many years in Dallas County.

Regardless of how a full-fledged forensic reconstruction of this historic and ancillary issue would be resolved, *Amici* stand on their factual representations in their petition-stage brief. Such presented a reasonable and good faith view of the official court records *Amici* now produce in the Appendix to this brief.

It is the Attorney General, not *Amici*, who disagree with the recollection of the Attorney General's trial counsel regarding the depositions in *Medrano*. [2 RR. 149:21-22.] *Amici* agree with the statement of the Attorney General's trial counsel that *this* "is a case of first impression [with] no cases directly on point." [2 RR. 151:13-16.] Such highlights the essential need to have this Court resolve the weighty constitutional dispute presented by this matter.

**CONCLUSION AND PRAYER FOR RELIEF**

For the foregoing reasons, this Court should vacate the judgment of the court of appeals because the statutory grant of independent prosecutorial authority to the Attorney General is unconstitutional.

DATED: JUNE 11, 2021

RESPECTFULLY SUBMITTED,

*/s/ Justin C. Pfeiffer*

---

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*/s/ Delia Aileen Garza*

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**CERTIFICATE OF SERVICE**

Pursuant to Texas Rule of Appellate Procedure 9.5(b) (d) & (e), I hereby certify that on June 11, 2021, I electronically filed the foregoing document Clerk of Court, using the efile.TXcourts.gov electronic filing system. In accordance with Rule 9.5(b)(1), I served all counsel by their email address listed below. My email address of justin.pfeiffer@fortbendcountytexas.gov.

DATED: JUNE 11, 2021

*/s/ Justin C. Pfeiffer*  
\_\_\_\_\_  
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Served Pursuant to Texas Rule of Appellate Procedure 68.11

**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitations of Rule 9.4 because it contains 7,359 words, excluded the parts of the brief exempted by Rule 9.4(i)(1).

DATED: JUNE 11, 2021

*/s/ Justin C. Pfeiffer*  
\_\_\_\_\_  
JUSTIN C. PFEIFFER

Nos. PD-1032-20 & PD-1033-20

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In the  
Court of Criminal Appeals

---

ZENA COLLINS STEPHENS,

*Petitioner,*

v.

THE STATE OF TEXAS,

*Respondent.*

---

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

---

**APPENDIX TO  
BRIEF OF *AMICI CURIAE* BRIAN M. MIDDLETON, DISTRICT  
ATTORNEY OF FORT BEND COUNTY; JOE D. GONZALES,  
CRIMINAL DISTRICT ATTORNEY OF BEXAR COUNTY; JOHN  
COLEMAN CREUZOT, CRIMINAL DISTRICT ATTORNEY OF DALLAS  
COUNTY; KIMBRA KATHRYN OGG, DISTRICT ATTORNEY OF  
HARRIS COUNTY; MARK A. GONZÁLEZ, DISTRICT ATTORNEY OF  
NUECES COUNTY; JOSÉ POMPA GARZA, DISTRICT ATTORNEY OF  
TRAVIS COUNTY; AND DELIA AILEEN GARZA, COUNTY ATTORNEY  
OF TRAVIS COUNTY IN SUPPORT PETITIONER ON THE MERITS**

**CONTENTS OF APPENDIX**

Deputation of Jonathan White; *State v. Rolando Medrano*, Rockwall Cnty. Cause No. 2-11-416 (439th Dist. Ct. Sept. 7, 2011)<sup>1</sup> .....1

Excerpts of Authenticated Clerk’s Record, *Carlos Medrano v. State*, Rockwall Cnty. Cause No. 2-11-418; Fifth Court Case No. 05-12-00316-CR<sup>2</sup> .....2

Excerpts of Authenticated Supplemental Reporter’s Record, Vol. I, *Carlos Medrano v. State*, Rockwall Cnty. Cause No. 2-11-418; Fifth Court Case No. 05-12-00316-CR<sup>3</sup> .....6

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<sup>1</sup> Counsel of Record reviewed an unauthenticated copy of this document in conjunction with drafting *Amici’s* petition-stage brief.

<sup>2</sup> Counsel of Record reviewed unauthenticated copies of these documents in conjunction with drafting *Amici’s* petition-stage brief.

<sup>3</sup> Counsel of Record ordered the appellate record in *Carlos Medrano v. State* to review whether additional evidence could be adduced to support *Amici’s* **qualified** statement from the petition-stage brief at issue for its veracity.



V.

ROLANDO MEDRANO

§  
§  
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§

IN AND FOR

ROCKWALL COUNTY, TEXAS

FILED FOR REC...  
ROCKWALL CO., TX  
2011 SEP -7 AM 10:15  
KAY MCJANELL  
DISTRICT CLERK  
DEPUTY

DEPUTATION

I, KENDA CULPEPPER, Criminal District Attorney in and for the County of ROCKWALL in the State of Texas, having full confidence in JONATHAN WHITE, of said County and State, do hereby nominate and appoint him, the said JONATHAN WHITE, my true and lawful Assistant Criminal District Attorney, in my name, place and stead, to do and perform any and all acts and things pertaining to the office of said Criminal District Attorney in and for the County of ROCKWALL, of the State of Texas, hereby ratifying and confirming any and all such acts and things lawfully done in the premises by virtue hereof.

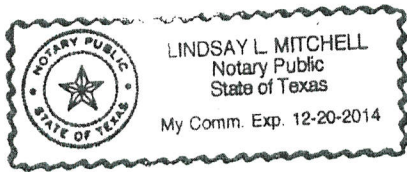
WITNESS my hand this 7<sup>th</sup> day of September A.D. 2011.

Kenda Culpepper  
KENDA CULPEPPER  
Criminal District Attorney in and for  
ROCKWALL County, Texas

THE STATE OF TEXAS  
COUNTY OF ROCKWALL

Before me, Lindsay Mitchell, a Notary Public, in and for ROCKWALL County, Texas, on this day personally appeared KENDA CULPEPPER, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office, this 7<sup>th</sup> day of September, A.D. 2011.



Lindsay Mitchell  
Notary Public in and for  
ROCKWALL County, Texas

THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL DOCUMENT ON FILE IN MY OFFICE.

# OF PAGES 1  
LEA CARLSON  
DISTRICT CLERK  
ROCKWALL COUNTY, TEXAS  
BY [Signature] 6-4-2021

**CLERK'S RECORD**

**VOLUME 1 OF 1**

**TRIAL COURT CAUSE NO. 2-11-418**

**Appeal Court Case No. 05-12-00316-CR**

**RECEIVED**  
COURT OF APPEALS <sup>59</sup>

JUN 26 2012

LISA MATZ  
CLERK, 5th DISTRICT

**IN THE 439th JUDICIAL DISTRICT COURT  
OF ROCKWALL COUNTY, TEXAS  
HONORABLE RICHARD MAYS, JUDGE PRESIDING**

**CARLOS MEDRANO, Plaintiff**

**VS.**

**THE STATE OF TEXAS, Defendant**

**FILED IN**  
COURT OF APPEALS

JUN 26 2012

**FILED IN**  
COURT OF APPEALS

JUN 26 2012

LISA MATZ  
CLERK, 5th DISTRICT

**APPEALED TO THE  
COURT OF APPEALS FOR THE FIFTH  
DISTRICT OF TEXAS, AT DALLAS, TEXAS**

**ATTORNEY FOR APPELLANT(S):**

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**Address** 1012 Ridge road  
Rockwall, Tx. 75087

**Telephone no.** 972-771-5525  
**Fax no.** 972-771-0377  
**SBOT no.** 00787585  
**Attorney for** Carlos Medrano

**FILED IN**  
COURT OF APPEALS

JUN 26 2012

LISA MATZ  
CLERK, 5th DISTRICT

Delivered to the Court of Appeals for the Fifth  
District of Texas, at Dallas, Texas on the 26<sup>th</sup> day of June, 2012

signature of clerk  
name of clerk  
title

Sue Hill  
Sue Hill  
Chief Deputy

Filed in the Court of Appeals for the Fifth District of Texas,  
at Dallas, Texas this \_\_\_\_\_ day of \_\_\_\_\_, 2012

By \_\_\_\_\_, Clerk  
By \_\_\_\_\_, Deputy

**CRIMINAL DOCKET - CAUSE NO. 2-11-418**

NAMES OF PARTIES	ATTORNEYS	OFFENSE	DATE OF FILING
THE STATE OF TEXAS	Kenda Culpepper - STATE	ILLEGAL VOTING, F3	09/08/11
VS.		Offense Date: 02/16/10 Arrest Date:	CHARGING INSTRUMENT:
CARLOS MEDRANO	RGT. TED LYON + GREG GRAY	Bond Amt: 0.00 Bond Co.:	Indictment
W/M DOB: [REDACTED] Dallas, TX 75219			

DATE OF ORDERS Month/Day/Year	ORDERS OF THE COURT
9-12-11	Agreed Order Personal Bond STATUS CHECK 9-15-11
9-14-11	ARR SET FOR 10/6/11 @ 1:00 PM
10-6-11	Δ, atty for Δ + At all received copy of Order on Extrajudicial statements Waiver of arraignment
10-6-11	Reset for Announcement/Plea to November 3rd, 2011 @ 1:00 p.m.
11-10-11	<del>STATUS CHECK FOR 11/23/12 @ 7:00 AM</del>
11/22/11	STATUS CHECK FOR 11/26/12 @
12-29-2011	Pre-trial Conducted. Reset 2/14/2012 @ 9:00 am.
	<del>Bench Trial for 2-14-12 @ 9:00 am</del>
02-14-2012	Bench Trial started
02-27-2012	*Count TWO Found Guilty - 5 yrs. T.D.C.J. - Probated for 5 years \$2,500.00 Fine \$253.00 Court Costs 180 day PCJ, As a Condition of Probation
02-28-2012	*Count <del>TWO</del> One Judgment of Acquittal by Court
02-28-2012	Notice of Appeal - Motion New Trial
02-27-2012	Order of Removal
02-27-2012	Order of Removal <sup>superseded</sup> suspended <sup>from office</sup> pending Appeal



CASE NO. 2-11-418

COUNT TWO

INCIDENT NO./TRN: 011 401 3049

THE STATE OF TEXAS

v.

CARLOS MEDRANO

STATE ID No.: TX

FILED FOR RECORD  
KAY MADANIEL, DISTRICT CLERK  
ROCKWALL COUNTY, TEXAS  
FEB 27 2012  
AM 7, 8, 9, 10, 11, 12, 1, 2, 13, 4, 15, 18 PM

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439th JUDICIAL DISTRICT COURT

IN AND FOR

ROCKWALL COUNTY, TEXAS

JUDGMENT OF CONVICTION BY COURT

Judge Presiding:	HON. Richard Mays	Date Judgment Entered:	FEBRUARY 27, 2012
Attorney for State:	JONATHAN WHITE	Attorney for Defendant:	TED LYON
Offense for which Defendant Convicted: <b>ILLEGAL VOTING</b>			
Charging Instrument:	INDICTMENT	Statute for Offense:	64.012 Election Code
Date of Offense:	02/16/10	Plea to Offense:	NOT GUILTY
Degree of Offense:	3RD DEGREE FELONY	Findings on Deadly Weapon:	N/A
Verdict of Court:	GUILTY	Plea to 1 <sup>st</sup> Enhancement Paragraph:	N/A
		Plea to 2 <sup>nd</sup> Enhancement/Habitual Paragraph:	N/A
		Findings on 1 <sup>st</sup> Enhancement Paragraph:	N/A
		Findings on 2 <sup>nd</sup> Enhancement/Habitual Paragraph:	N/A
Punished Assessed by:	COURT	Date Sentence Imposed:	FEBRUARY 27, 2012
		Date Sentence to Commence:	FEBRUARY 27, 2012
Punishment and Place of Confinement:	FIVE (5) YEARS TEXAS DEPARTMENT OF CRIMINAL JUSTICE		

THIS SENTENCE SHALL RUN CONCURRENTLY.

SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR FIVE (5) YEARS.

Fine:	Attorney Fees: (if applicable)	Court Costs:	Restitution:	Restitution Payable to:
\$ 2,500.00	\$	\$ 253.00	\$ N/A	<input type="checkbox"/> VICTIM (see below) <input type="checkbox"/> AGENCY/AGENT (see below)

Sex Offender Registration Requirements do not apply to the Defendant. TEX. CODE CRIM. PROC. chapter 62.

The age of the victim at the time of the offense was N/A .

Time Credited: ( DAYS) NOTES: N/A

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

One hundred eighty (180) DAYS RCJ, AS A CONDITION OF PROBATION

This cause was called for trial in Rockwall County, Texas. The State appeared by her District Attorney.

Counsel / Waiver of Counsel (select one)

- Defendant appeared in person with Counsel.
- Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

It appeared to the Court that Defendant was mentally competent and had pleaded as shown above to the charging instrument. Both parties announced ready for trial. A jury was selected, impaneled, and sworn. The INDICTMENT was read to the jury, and Defendant entered a plea to the charged offense. The Court received the plea and entered it of record.

The jury heard the evidence submitted and argument of counsel. The Court charged the jury as to its duty to determine the guilt or innocence of Defendant, and the jury retired to consider the evidence. Upon returning to open court, the jury delivered its verdict in the presence of Defendant and defense counsel, if any.

The Court received the verdict and ORDERED it entered upon the minutes of the Court.

Punishment Assessed by Jury / Court / No election (select one)

CLERK'S CERTIFICATE  
THAT TRANSCRIPT  
IS TRUE AND CORRECT

CARLOS MEDRANO

VS.

THE STATE OF TEXAS

§  
§  
§  
§  
§

I, Kay McDaniel, Clerk of the District Court of Rockwall County, Texas, do hereby certify that the above and foregoing are true and correct copies of all the proceedings in accordance with the rules of appellate procedure to be included in the transcript in the case of **CARLOS MEDRANO VS. THE STATE OF TEXAS**.

As shown by the courts order, Cause No. **2-11-418** to which this certification is attached and made part hereof, comprise a true and correct transcript of all the matters and proceedings in this cause.

Given under my hand and seal of office at Rockwall, Texas, this the 26<sup>th</sup> day of June, 2012.

KAY MCDANIEL, DISTRICT CLERK  
ROCKWALL COUNTY, TEXAS

BY: *Sue Hill*  
Chief Deputy

SUPPLEMENTAL REPORTER'S RECORD

VOLUME 1 OF 1 VOLUME

TRIAL COURT CAUSE NOS. 2-11-414, 2-11-415, 2-11-416, 2-11-417, 2-11-418, 2-11-419, 2-11-420, 2-11-108, & 2-11-186

COURT OF APPEALS CAUSE NO. 05-12-00316-CR

THE STATE OF TEXAS ) IN THE DISTRICT COURT
VS. )
RAQUEL M. MEDRANO, )
SYLVIA MEDRANO, ) ROCKWALL COUNTY, TEXAS
FRANK MEDRANO, III, )
RICARDO MEDRANO, SR., )
CARLOS MEDRANO, ROBERT )
EDWARD MEDRANO, ROLANDO )
MEDRANO, ERICA PEREZ. ) 439TH JUDICIAL DISTRICT

PRE-TRIAL HEARING

On the 29th day of December 2011, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Richard Mays, sitting for the Honorable David Rakow, Presiding Judge, held in Rockwall, Rockwall County, Texas:

Proceedings reported by computerized machine shorthand.

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14 COUNSEL FOR DEFENDANTS, Raquel, Sylvia, Frank, Ricardo,  
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19 COUNSEL FOR THE DEFENDANT, Rolando Medrano  
20  
21  
22  
23  
24  
25

1 P R O C E E D I N G S :

2 THE COURT: All right. We have the  
3 following cause numbers -- and, gentlemen, if I miss a  
4 number, please let me know when I'm through -- 2-11-415,  
5 2-11-417, 2-11-418, 2-11-108, 2-11-414, 2-11-420,  
6 2-11-416, 2-11-186, and 2-11-419. Is that all the cause  
7 numbers, as far as you know?

8 MR. WHITE: Yes, sir.

9 THE COURT: I'll start over here.  
10 Mr. White, state your name for the court reporter and  
11 who you represent.

12 MR. WHITE: Jonathan White on behalf of  
13 the Attorney General of Texas. I'm the Assistant  
14 Attorney General representing the State.

15 MR. GLICKLER: David Glickler, the same  
16 representation.

17 MR. GRAY: Greg Gray on behalf of all of  
18 the defendants, except for Rolando Medrano.

19 MR. BARMORE: Benjamin Barmore on behalf  
20 of Rolando Medrano.

21 THE COURT: Okay. We have the official  
22 court reporter of the 439th in attendance here today and  
23 was so on our first hearing in this case and will be at  
24 one or more trials, but there will be other court  
25 reporters at other trials.



## REPORTER'S CERTIFICATE

1  
2 THE STATE OF TEXAS )  
3 COUNTY OF ROCKWALL )

4 I, Barbara L. Tokuz, CSR, RDR, CRR, Official Court  
5 Reporter in and for the 439th Judicial District Court of  
6 Rockwall County, State of Texas, do hereby certify that  
7 the above and foregoing contains a true and correct  
8 transcription of all portions of evidence and other  
9 proceedings requested in writing by counsel for the  
10 parties to be included in this volume of the Reporter's  
11 Record, in the above-styled and numbered cause, all of  
12 which occurred in open court or in chambers and were  
13 reported by me.

14 I further certify that this Reporter's Record of  
15 the proceedings truly and correctly reflects the  
16 exhibits, if any, admitted by the respective parties.

17 WITNESS MY OFFICIAL HAND this the 17th day of  
18 January, 2012.

19 \_\_\_\_\_  
Barbara L. Tokuz, CSR, RDR, CRR  
20 CSR No. 4615, Expiration Date: 12/31/2012  
Official Reporter - 439th District Court  
Rockwall County Courthouse  
21 1111 E. Yellowjacket Lane, Suite 401  
Rockwall, Texas 75087  
22 Telephone: (972) 204-6633  
23  
24  
25

**CERTIFICATE OF SERVICE**

Pursuant to Texas Rule of Appellate Procedure 9.5(b) (d) & (e), I hereby certify that on June 11, 2021, I electronically filed the foregoing document Clerk of Court, using the efile.TXcourts.gov electronic filing system. In accordance with Rule 9.5(b)(1), I served all counsel by their email address listed below. My email address of justin.pfeiffer@fortbendcountytexas.gov.

DATED: JUNE 11, 2021

*/s/ Justin C. Pfeiffer*  
\_\_\_\_\_  
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