

PD-1032-20 & PD-1022-20

In the Texas Court of Criminal Appeals

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CRIMINAL APPEALS
1/20/2022
DEANA WILLIAMSON, CLERK

ZENA COLLINS STEPHENS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

EX PARTE ZENA COLLINS STEPHENS,
Petitioner.

On Petition for Discretionary Review
from the First Court of Appeals, Houston

**BRIEF OF THE REPUBLICAN PARTY OF TEXAS
AS AMICUS CURIAE**

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INTEREST OF AMICUS CURIAE

The Republican Party of Texas (“RPT”) is the state political organization of the Republican Party in the State of Texas. The RPT represents the interests of Republican voters and candidates at all levels throughout the state, including, among other things, assisting candidates in ensuring the integrity of elections. Accordingly, the Court’s decision to eliminate the authority of the Attorney General to prosecute election law violations implicates the interests of RPT, Republican voters, and candidates because it affects the security, fairness, and integrity of elections in the State of Texas.

TO THE HONORABLE TEXAS COURT OF CRIMINAL APPEALS:

PROCEDURAL HISTORY

The Federal Bureau of Investigation (“FBI”) uncovered potential campaign finance law violations by Jefferson County Sheriff Zena Stephens (“Stephens”), a democrat. The FBI passed the investigation to the Texas Rangers. The Texas Rangers presented the case to Jefferson County District Attorney Bob Wortham (“Wortham”), a democrat. Wortham *referred* the Texas Rangers to the Texas Attorney General’s Office (the “Attorney General”) who presented this case to a Chambers County grand jury, which indicted Stephens on three counts: one count of tampering with a government record (Tex. Pen. Code §37.10) [reporting a \$5,000 campaign contribution in the \$50 or less section of a campaign finance report] and two counts of unlawfully making or accepting an illegal campaign contribution (Tex. Elec. Code §253.033(a)) [accepting cash contributions in excess of \$100 from two different individuals].

The Chambers County trial court quashed the tampering with a government record count concluding that the authority of the Attorney General was limited to election laws found within the Texas Election

Code. Chief Justice Sherry Radack¹ and Justice Peter Kelly² disagreed with the trial court and upheld the authority of the Attorney General to prosecute any election law violations. Two days after the 2022 primary filing deadline, on a pretrial writ, the Texas Court of Criminal Appeals held that the Attorney General did not have constitutional authority to prosecute election law violations under separation of powers principles even though the Texas Legislature delegated this authority to the Attorney General in Tex. Elec. Code § 273.021.

SUMMARY OF THE ARGUMENT

Texas law does not explicitly state that the Attorney General may not share prosecutorial responsibilities with county and district attorneys. In 1951, the Texas Legislature assigned the right to originate criminal prosecutions for election violations to the Attorney General. This right to prosecute did not usurp the authority of Article V prosecutors. Instead, the law emphasized the state's desire to maintain lawful elections. In 2021, the Texas Legislature revised Texas election laws in response to public concern about election integrity and included

¹ Chief Justice of the First Court of Appeals since 2002.

² Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization.

the Attorney General as the enforcement centerpiece in the Election Integrity Protection Act of 2021.

Now, in one stroke, this Court has discarded over a century of Texas jurisprudence and carefully crafted legislation that upholds and accentuates the authority of the Attorney General to “perform such other duties as may be required by law.” Tex. Const. art. IV, § 22. Here, the local district attorney *referred* the Texas Rangers to the Attorney General. This is *not* a separation of powers conflict. Nonetheless, the Court adopts an argument by activist democrats and invalidates Tex. Elec. Code § 273.021, eliminating the authority of the Attorney General to investigate and prosecute criminal violations of the Election Code.

ARGUMENT

This Court has violated basic separation of powers principles by legislating from the bench. In 1951, the Texas Legislature authorized the Attorney General to prosecute election law violations. In 2014, this Court refused discretionary review of the Dallas Court of Appeals decision in *Medrano v. State*³. Now, after Texans saw democrat legislators abandon their legislative duties and responsibilities during the 87th Legislative

³ 421 S.W.3d 869 (Tex. App.—Dallas 2014, pet. ref’d).

Session and the public harbors mistrust in our elections, this Court strikes down longstanding law – that the Attorney General can prosecute election law violations.

I. The 52nd Texas Legislature gave the Attorney General the authority to prosecute election law violations to maintain law and order.

For seventy years, Texans have given the Attorney General the authority to originate the prosecution of election law violations. In 1951, the Texas Legislature granted the authority to initiate prosecutions concerning election law violations to the Attorney General. Act of May 30, 1951, 52nd Leg., R.S., ch. 492 sec. 130(2), 1951 Tex. Gen. Laws 1097, 1152 (authorizing the Attorney General to “appear before a grand jury and prosecute any violation of the election laws of this State by any candidate, election official, or any other person, in state-wide elections, or elections involving two (2) or more counties”).

On May 1, 1951, Governor Allan Shivers sent a message to the members of the 52nd Legislature:

The election machinery of this State is seriously in need of strengthening, and for this reason I wholeheartedly support the revision and recodification of our election laws. I sincerely hope that you will do everything in your power to see that House Bill 6 is passed at this session of the Legislature.

Without relinquishing any support for House Bill No. 6, I would like to call your attention to two provisions which are incorporated in House Bill No. 6, but which have also been introduced as separate measures. House Bill No. 731 and a companion bill, Senate Bill 428, deal with the method of contesting elections and **give the power to the Attorney General to investigate and prosecute violations of the election laws. Because of our present antiquated system, our local law enforcement officials have been unable to cope with problems arising out of our elections. If nothing else is passed with reference to this subject, I would like to see this measure become law.** House Bill No. 766 and Senate Bill No. 429 provide for prompt report of returns of elections and allow the Secretary of State to send a messenger to obtain the report when necessary.

Passage of the above mentioned Legislation would greatly assist our law enforcement agencies and would help prevent Texas from becoming a refuge state for criminals.

Message of Gov. Shivers, Tex. H.J. 2023-2024, 52nd Leg., R.S. (1951)
(emphasis added).

In 1951, the Texas Legislature and the Texas Governor recognized a need to attain public confidence in the integrity of our elections. The 87th Legislature revised our election laws and made the Attorney General the centerpiece of enforcement. The stated intent of the 87th Legislature was to conduct uniform elections and reduce the likelihood of

fraud in the conduct of elections – making it easy to vote and hard to cheat. *See* Tex. S.B. 1, 87th Leg., 2d C.S. (2021). *See also* Daniel Friend, *Gov. Abbott Signs Texas GOP-Backed Election Reform Bill Into Law*, *The Texan*, (Sept. 7, 2021), <https://thetexan.news/gov-abbott-signs-texas-gop-backed-election-reform-bill-into-law/>.

II. The Court’s reasoning is based on a false premise – that the prosecution of election law violations offers a bright line distinction between executive and judicial duties.

On January 11, 2022, a Special Court of Review consisting of three Texas appellate justices⁴ held that a title (“judge”) does not signify the true substance of the position (performing duties akin to those of an executive and legislator). In the written opinion, the Court includes a reminder that the Texas Supreme Court “repeatedly cautions us against elevating form over substance.” *In re Inquiry Concerning Honorable Sarah Eckhardt*, No. SCR-21-0001 (Tex. Spec. Ct. Rev. Jan. 11, 2022).⁵

⁴ The Special Court of Review consists of the Honorable Brian Quinn, Chief Justice of the Seventh Court of Appeals; The Honorable Charles Kreger, Justice of the Ninth Court of Appeals; and the Honorable W. Stacy Trotter, Justice of the Eleventh Court of Appeals.

⁵ *See, e.g., Godoy v. Wells Fargo Bank, N.A.*, 575 S.W.3d 531, 536 (Tex. 2019) (quoting *Dudley Constr., Ltd. v. Act Pipe & Supply, Inc.*, 545 S.W.3d 532, 538 (Tex. 2018), and stating that “[w]henever possible, we reject form-over-substance requirements that favor procedural machinations over reaching the merits of a case”); *Thota v. Young*, 366 S.W.3d 678, 690 (Tex. 2012) (stating that “we have long favored a common sense

A prosecutor representing the State of Texas in a prosecution for election law violations (or any criminal law violation) is performing duties akin to the executive department (Article IV), not the judicial department (Article V). A judge, in the common sense, adjudicates disputes. *See City of Round Rock v. Smith*, 687 S.W.2d 300, 302-03 (Tex. 1985) (stating that “[j]udicial power is the power conferred upon a public officer to adjudicate the rights of individual citizens by construing and applying the law”).

A prosecutor is not a judge. The judiciary do not prosecute crimes.

III. Texas Statutes clearly do not compartmentalize Article IV and Article V.

A quick search of the Texas Government Code demonstrates the clear blurred lines between Article IV and Article V. For example, the Attorney General is responsible for *defending* some Article V judges. Tex. Gov’t Code § 74.141. So, where is this Court’s line in the sand on the division between Article IV and Article V? Under the Court’s rationale, the Attorney General’s statutory responsibility to defend the judiciary is more properly assigned to the judicial department, as well. Texas law

application of our procedural rules that serves the purpose of the rules, rather than a technical application that rigidly promotes form over substance”).

does not rigidly define the limits of the Attorney General’s power in this way.

Article IV, Section 22 of the Texas Constitution permits the Legislature to prescribe the Attorney General “other duties as may be required by law.” The Texas Government Code prescribes the Attorney General duties throughout that do not fall squarely within an executive role.

IV. The Texas District and County Attorneys Association affirms that the Attorney General can prosecute certain crimes and assist local prosecutors.

The Texas District and County Attorneys Association, a nonprofit organization serving Texas prosecutors, acknowledges the authority of the Attorney General to prosecute crimes “when a local prosecutor asks for, or consents to” the involvement. Texas District and County Attorneys Association, *Texas Prosecution 101* (Written in 2004; revised and reissued in 2009, 2014, 2018), <https://www.tdcaa.com/wp-content/uploads/Texas-Prosecution-101-2018.pdf>.

A Texas prosecuting attorney may request the assistance of the Attorney General “in the prosecution of all manner of criminal cases or in performing any duty imposed by law on the prosecuting attorney.” Tex.

Gov't Code § 41.102(b). Under the authority outlined in the Texas Penal Code, the Texas Attorney General has:

- concurrent jurisdiction to prosecute offenses that involve state property (Tex. Pen. Code § 1.09);
- the authority to accept certain citizen complaints (Tex. Pen. Code § 1.10(e));
- the authority to take legal action on certain complaints (Tex. Pen. Code § 1.10(f));
- the responsibility to defend any state agency against action by the federal government (Tex. Pen. Code § 1.10(h));
- jurisdiction (“if requested to do so by a prosecuting attorney”) to assist in the prosecution of hate crimes (Tex. Pen. Code § 12.47(b));
- a requirement to dedicate an individual to assist in coordinating requests to assist in the prosecution of hate crimes (Tex. Pen. Code § 12.47(b));
- the absolute right to receive notice of the conviction of a corporation or business entity (Tex. Pen. Code § 12.51(e));
- concurrent jurisdiction (with “consent of the appropriate local county or district attorney”) to prosecute Medicaid theft (Tex. Pen. Code § 31.03(j));
- a requirement to assist a federal or state prosecuting attorney in the investigation of a false statement to obtain a mortgage loan (Tex. Pen. Code § 32.32(d));
- concurrent jurisdiction (with “consent of the appropriate local county or district attorney”) to prosecute a false statement to obtain a mortgage loan (Tex. Pen. Code § 32.32(e));
- concurrent jurisdiction (with “consent of the appropriate local county or district attorney”) to prosecute misapplication of fiduciary property or property of a financial institution involving Medicaid (Tex. Pen. Code § 32.45(e));
- concurrent jurisdiction (with “consent of the appropriate local county or district attorney”) to prosecute fraudulent security of document execution involving Medicaid (Tex. Pen. Code § 32.46(e));
- concurrent jurisdiction (with “consent of the appropriate local county or district attorney”) to prosecute exploitation of child,

elderly individual, or disabled individual involving Medicaid (Tex. Pen. Code § 32.53(e));

- the authority to assist the prosecuting attorney in the investigation or prosecution of any offense in Chapter 33 [Computer Crimes] (Tex. Pen. Code § 33.04);
- concurrent jurisdiction (with “consent of the appropriate local county or district attorney”) to prosecute tampering with direct recording electronic voting machine (Tex. Pen. Code § 33.05(f));
- the authority to assist the prosecuting attorney in the investigation or prosecution of any offense in Chapter 33A [Telecommunications Crimes] (Tex. Pen. Code § 33A.06);
- the authority to assist the prosecuting attorney in the investigation or prosecution of any offense in Chapter 34 [Money Laundering] (Tex. Pen. Code § 34.03);
- the authority to assist the prosecuting attorney in the investigation or prosecution of any offense in Chapter 35 [Insurance Fraud] (Tex. Pen. Code § 35.04);
- the authority to be a complainant if an individual knowingly obstructs a health care fraud investigation (Tex. Pen. Code § 35A.02(a)(11));
- concurrent jurisdiction (with “consent of the appropriate local county or district attorney”) to prosecute health care fraud that involves a health care program (Tex. Pen. Code § 35A.02(f));
- concurrent jurisdiction (with “consent of the appropriate local county or district attorney”) to prosecute tampering with government record involving Medicaid (Tex. Pen. Code § 37.10(i));
- concurrent jurisdiction (with “consent of the appropriate local county or district attorney”) to prosecute any offense in Chapter 39 [Abuse of Office] (Tex. Pen. Code § 39.015);
- concurrent jurisdiction (with “consent of the appropriate local county or district attorney”) to investigate civil rights violations in custody that involve serious bodily injury or death (Tex. Pen. Code § 39.04(d)); and
- concurrent jurisdiction to prosecute prohibition on purchase and sale of human fetal tissue (Tex. Pen. Code § 48.03(f)).

The Texas Election Code outlines the role of the Attorney General:

- accept notice of unlawful voting or registration (Tex. Elec. Code § 15.028);
- receive audit results from the Texas Secretary of State (Tex. Elec. Code § 18.065(e)(3));
- bring an action to recover a civil penalty (Tex. Elec. Code § 18.065(f));
- seek a temporary restraining order, writ of injunction, or mandamus to protect voting rights (Tex. Elec. Code § 31.005(c));
- receive referrals from the Texas Secretary of State (Tex. Elec. Code §§ 31.006, 34.005);
- request to inspect certain election records (Tex. Elec. Code § 64.009(g));
- operate the address confidentiality program (Tex. Elec. Code § 58.052(b));
- receive notice of cancellation requests and prescribe the form and manner of submission (Tex. Elec. Code § 84.037(b)-(c));
- receive notice of rejected ballot and prescribe the form and manner of submission (Tex. Elec. Code § 87.0431(b)-(c));
- represent the Texas Secretary of State in seeking injunctive relief against the use of unapproved voting equipment (Tex. Elec. Code § 122.031(b));
- have access to certain materials concerning electronic voting systems (Tex. Elec. Code § 122.0331(d));
- appoint two persons as examiners of voting systems and equipment (Tex. Elec. Code §§ 122.035(a), § 122.067(a), 122.069(a), 122.092(a));
- set the amount of compensation for examiner of voting systems and equipment (Tex. Elec. Code §§ 122.037(c), 122.067(e), 122.069(e), 122.094(c));
- receive notification from the Texas Secretary of State to initiate a lawsuit (Tex. Elec. Code § 122.0911);
- receive a report from the Texas Secretary of State (Tex. Elec. Code § 123.064);
- seek a writ of mandamus to compel the filing of a report (Tex. Elec. Code § 123.065);
- receive affidavits from voters and investigate the allegations (Tex. Elec. Code § 273.001(a));
- concurrent jurisdiction with district or county attorney to conduct an investigation on his own initiative to determine if criminal

conduct occurred in connection with an election (Tex. Elec. Code § 273.001);

- mandatory responsibility to investigate a matter after receiving an affidavit under Tex. Elec. Code § 15.028 (Tex. Elec. Code §273.001(c));
- permissive ability to investigate allegations on complaint from the Texas Secretary of Texas (Tex. Elec. Code § 273.001(d));
- direct the county or district attorney to assist in an investigation Tex. Elec. Code § 273.002(1);
- direct the Texas Department of Public Safety to assist in an investigation (Tex. Elec. Code § 273.002(2));
- impound election returns, voted ballots, signature roster, and other election records (Tex. Elec. Code § 273.003);
- permissive prosecution of election laws (Tex. Elec. Code § 273.021);
- direct the county or district attorney to assist in an investigation (Tex. Elec. Code § 273.022); and
- direct the Texas Department of Public Safety to serve a subpoena (Tex. Elec. Code § 273.023).

Applying this Court’s rationale, all of this statutory authority would be unconstitutional. The opposite is the more supported position. The Attorney General has broad authority to undertake a broad array of duties “as may be required by law.” Tex. Const. art IV, § 22.

CONCLUSION

The Court should grant the State of Texas’s motion for rehearing rescind its opinion entered on December 15, 2021, and affirm the judgment of the court of appeals.

Respectfully submitted,

/s/ Matthew Rinaldi

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