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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No.'s PD-0522-21, 0523-21, 0524-21, and 0525-21

TO THE COURT OF CRIMINAL APPEALS
IN THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
5/18/2022
DEANA WILLIAMSON, CLERK

Cause No.'s 18345, 18346, 18347, and 18348
In the 21st District Court
Of Washington County, Texas

ROBBIE CHARETTE,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

STATE'S REPLY BRIEF ON PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Tex. R. App. P. 39.1(b), Respondent requests oral argument as Charette raises a novel argument not yet addressed by Texas courts.

IDENTITY OF PARTIES AND COUNSEL

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Trial Judge: The Honorable J.D. Langley

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STATEMENT OF THE CASE

A Washington County District Judge appointed Austin County Criminal District Attorney Travis J. Koehn to serve as county attorney pro tem regarding the investigation and prosecution of alleged election code and government code violations by Petitioner, "Charette." The four misdemeanor violations are (CR 1):

Trial Court Cause # Appellate Cause # Petition Cause #	**Offense Charged**	**Statute for Offense**
18,345 14-19-00855-CR PD-0522-21	Failure to Disclose True Source of Communication	Tex. Elec. Code Ann. § 255.004
18,346 14-19-00856-CR PD-0523-21	Misleading Use of Office Title	Tex. Elec. Code Ann. § 255.006
18,347 14-19-00857-CR PD-0524-21	Failure to Timely File Personal Financial Statement	Tex. Gov't Code Ann. § 572.027 & Tex. Loc. Gov't Code Ann. § 159.056
18,348 14-19-0058-CR PD-0525-21	Political Campaign Record Keeping Violation	Tex. Elec. Code Ann. § 254.001

The trial court denied Charette's pretrial motion for habeas relief on October 16, 2019. Charette timely filed her notice of appeal on October 28, 2019. The Fourteenth Court of Appeals ruled that Charette failed to establish a cognizable claim for relief. See *Charette v. State*, 2021 Tex. App. LEXIS 2927 (Tex. App.–Houston [14th Dist.] 2021) (unpublished op.).

ISSUES PRESENTED

Whether a cognizable pretrial writ of habeas corpus may stand on non-existent law.

Whether a cognizable pretrial writ of habeas corpus may stand on impermissible due process claims.

Whether a cognizable pretrial writ of habeas corpus may stand on impermissible collateral attacks on factual sufficiency.

SUMMARY OF THE ARGUMENT

Petitioner's, "Charette's," pretrial writ of habeas corpus claims rest on non-existent law. A cognizable pretrial writ establishes a claim that, if true, would deprive the trial court of its power over the case and result in immediate release. Charette argues that she is entitled to release as her criminal prosecution is barred absent a referral from the Texas Ethics Commission ("TEC"). However, Charette provides no provision that deprives the prosecutor pro tem of his prosecutorial jurisdiction or restricts his authority to exercise that jurisdiction.

Charette asserts that Texas Government Code § 571.171 impliedly creates a bar to prosecution; however, § 571.171 merely establishes the TEC's civil enforcement authority and its power to refer matters to appropriate prosecutors.

Charette's due process claims cannot form the basis of cognizable pretrial habeas relief, as appropriate post-conviction remedies exist. Charette's assertion that a civil agency's evidentiary review would have exonerated her and barred her prosecution constitutes an impermissible collateral attack on evidentiary sufficiency. Charette fails to present cognizable claims.

STATEMENT OF FACTS

Petitioner, Robbie Gail Charette ("Charette"), ran for county court-at-law judge in Washington County in the March 2018 primary. During the campaign, citizens reported potential election code violations to the Washington County Attorney's Office. (CR 53-54). Austin County Criminal District Attorney Travis Koehn was appointed to serve as special prosecutor to review the case.

Despite reporting the alleged crimes to the Washington County Attorney, no citizen filed a complaint against Charette with the TEC, the TEC certified that no sworn complaint existed, (SUPP CR 3), and the TEC never formally referred the case to a prosecutor. (2 RR 26-27). Charette never offered any advisory opinions from the TEC to demonstrate that she sought a TEC opinion on her own. Nor did she invoke any administrative remedies.

The Washington County Grand Jury indicted Charette for four misdemeanor crimes under the Texas Election Code and Texas Government Code. (CR 1). Despite Charette's un-cited assertions on pages one and four of her brief, no evidence indicates that Charette's political opponents "made sure" that the grand jury unjustly indicted Charette.

ARGUMENT AND AUTHORITIES

ISSUE ONE: A COGNIZABLE PRETRIAL WRIT OF HABEAS CORPUS MAY NOT STAND ON NON-EXISTENT LAW.

I. PETITIONER'S CLAIM RELIES ON NON-EXISTENT LAW

A. A Cognizable Claim Requires Immediate Release

Charette fails to establish a cognizable claim, as she lacks any constitutional, statutory, or common law provision that bars prosecution and requires dismissal of the instant indictments. Pretrial habeas is an "extraordinary remedy," and whether a claim is cognizable on pretrial habeas is a threshold issue that should be addressed before the merits of the claim may be resolved. *Ex parte Doster*, 303 S.W.3d 720, 724 (Tex. Crim. App. 2010); *Ex parte Smith*, 178 S.W.3d 797, 801 (Tex. Crim. App. 2005). This Court, in *Ex parte Smith*, described a cognizable pretrial writ claim as a claim that, if true, would deprive the trial court of its power over the case and result in the defendant's immediate release. *Ex parte Smith*, 178 S.W.3d at 801; *Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001).

Charette applied for writ of habeas after the trial court refused to dismiss the indictments against her. (CR 21-27, 58-61). However, a trial court may only take the drastic measure of dismissing indictments in extremely limited circumstances authorized by constitution, statute, or common law. *State v.*

Mungia, 119 S.W.3d 814, 816 (Tex. Crim. App. 2003) (citing *State v. Frye*, 897 S.W.2d 324, 330 (Tex. Crim. App. 1995)). Charette's request, rather than relying on existing law, requires the Court to create new law, as no statute cited by Charette purports to give exclusive prosecutorial jurisdiction over her crimes to the TEC or purports to restrict the special prosecutor's exercise of his constitutional authority to initiate prosecutions.

B. Texas Government Code § 571.171 Never Bars Prosecution

Charette relies primarily on Texas Government Code § 571.171 and its associated provisions to support her position, but a plain reading of the statute shows that it never mentions prosecutorial jurisdiction, much less conveys exclusive original prosecutorial jurisdiction to the TEC. Texas Government Code § 571.171(a) merely states, "On a motion adopted by an affirmative record 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." Subsection (b) describes referral procedures for cases involving bribery and abuse of office. Subsection (c) permits sharing confidential information with prosecutors upon referral. A plain reading reflects no reference to barring prosecutions absent a TEC referral.

1. *Enforcement Provisions Never Address Prosecutorial Jurisdiction*

Texas Government Code § 571.171 generically describes the TEC's civil enforcement power but makes no reference to prosecutorial jurisdiction over criminal offenses. Texas Government Code § 571.061(a) grants the TEC the authority to civilly enforce election law provisions. Specifically, the TEC has the power to: hold hearings and render decisions on complaints (Tex. Gov't Code Ann. § 571.121(a)(1); enter settlements (Tex. Gov't Code Ann. § 571.121(a)(2)); civilly enforce penalties or refer cases to prosecutors when appropriate (Tex. Gov't Code Ann. § 571.171); issue cease and desist orders (Tex. Gov't Code Ann. § 571.172(1)); issue affirmative orders requiring candidates to comply with the Government Code (Tex. Gov't Code Ann. § 571.172(2)); and impose civil penalties for certain violations (Tex. Gov't Code Ann. § 572.033).

Charette seems to argue that the ability to "enforce" election laws equates to original and exclusive prosecutorial jurisdiction by stating that no statute grants the district attorney "initial enforcement authority" over election laws. However, her broad interpretation is unsupported by the text of the statute. Section 571.171 establishes two powers: enforcement and referral. "Enforce," in context, describes the TEC's civil authority to seek civil remedies. The only

reference to criminal prosecution in § 571.171 arises regarding the TEC's referral power, not enforcement. Charette points to no law which defines "enforce" to include any right to prosecutorial jurisdiction, let alone an exclusive right. Charette further provides no legislative analysis showing that the legislature intended to adopt, attempted to adopt, or even considered the notion of granting the TEC original prosecutorial jurisdiction in this statute, much less exclusive jurisdiction.

If the legislature meant to grant prosecutorial jurisdiction to the TEC, the legislature could have plainly stated it, as it did in the statute addressed in *Stephens*. Tex. Elec. Code Ann. § 273.021; *State v. Stephens*, --- S.W.3d ----2021 WL 5917198 at 7, 8 (Tex. Crim. App. 2021). Such a grant of authority would constitute an unconstitutional infringement on separation of powers, as the Court has plainly held. *Id.* However, the legislature certainly could have included the language if it genuinely intended to grant this power to the TEC. Such a prosecutorial jurisdiction provision is notably absent in all statutes related to the TEC's enforcement authority.

2. Referral Provisions Never Address Prosecutorial Jurisdiction

Charette's reliance on the referral responsibility provisions described in Texas Government Code § 571.171 is similarly misplaced. When describing

referral, the statute again lacks any language describing the legal impact on cases that are prosecuted without a TEC referral. Notably, in § 571.171's very text, the legislature recognizes the existence of jurisdictionally appropriate prosecuting attorneys rather than granting that designation to the TEC.

None of the associated referral provisions in the Texas Government Code grant the TEC prosecutorial jurisdiction over election crimes or deprive local district and county attorneys of their prosecutorial jurisdiction over said crimes. Tex. Gov't Code Ann. § 571.132, 571.134, and 571.171. However, Charette asks the Court to rule as if the statute had included such subsections. Charette provides neither plain text nor legislative history to show that the legislature considered, much less intended, to unconstitutionally deprive district and county attorneys of their jurisdiction. This absence of legal authority cannot serve as a cognizable basis for pretrial habeas relief.

3. Statutory Context Shows Prosecutorial Authority Was Not Considered

The context of the TEC provisions affirmatively shows that the legislature knew how to address the impact that a TEC decision might have on criminal prosecutions and chose not to include such a statutory provision regarding Texas Government Code § 571.171. Texas Government Code § 571.091, for instance, addresses the process that applies when the candidate herself

requests a TEC opinion on the legality of her behavior. Tex. Gov't Code Ann. § 571.091. It states that should the TEC issue an opinion in the candidate's favor, then reliance on such an opinion is a defense to criminal and civil penalties. Tex. Gov't Code Ann. § 571.097. Considering the legislature clearly knew it could address the impact of TEC decisions on prosecutorial discretion, the absence of such a provision related to Texas Government Code § 571.171 is conspicuous.

Context further shows that the TEC statutory scheme for referral is inconsistent with Charette's interpretation. Charette's interpretation would mean that the legislature left several vital questions unanswered:

- Does the statute convey exclusive prosecutorial jurisdiction to the TEC? If so, does the statute create a bifurcated prosecutorial process whereby the TEC initiates prosecution but local prosecutors finish it?
- If the Statute grants prosecutorial jurisdiction to the TEC, are commission members required to be licensed sworn prosecutors? It appears not. Tex. Gov't Code Ann. § 571.0232; Tex. Const. art. III, § 24a. If not, how would the legislature justify having committee members engage in the unauthorized practice of law?
- If the statute merely restricts prosecutorial discretion by allowing TEC decisions to bind local prosecutors, then do district and county attorneys have the right to refuse a case once the TEC refers it?
- If a local prosecutor refuses a referral from the TEC, does the TEC have the right to independently prosecute?

If § 571.171 operated to bar Charette's prosecution as Charette claims, then the legislature would naturally need to account for these questions. However, no answers can be found within the statutes.

Perhaps the most glaring contextual proof that the legislature never intended the TEC to have prosecutorial jurisdiction *or* limit the discretionary authority of local prosecutors involves the statute of limitations. The statute of limitations for Class A and B misdemeanors is two years. Tex. Code Crim. Pro. Ann. art. 12.02. If the only way to prosecute misdemeanor election crimes is to receive a TEC referral, then logically the TEC must review and refer all alleged election crimes within two years of the offense date. However, the TEC's referral statute ignores this issue. In fact, it allows unlimited continuances for review. Tex. Gov't Code Ann. § 571.136. Further, no statute tolls the limitations on election crimes until a TEC's referral review is complete. The statutory inconsistency shows that the legislature never contemplated the TEC's enforcement and referral provisions as impacting district and county attorney jurisdiction or discretion.

Charette's lack of legal authority distinguishes her case from a case such as *Stephens*, where the defendant raised legal issues which the Court deemed worthy of consideration at pretrial. In *Stephens*, the Court examined two

disparate legal authorities that plainly and facially purported to give original prosecutorial jurisdiction to distinct entities. *Stephens*, at 3. Here, no conflict between legal authorities exists. Charette's cited statutes simply never attempt to give the TEC initial prosecutorial jurisdiction and never attempt to restrict a prosecutor's discretionary authority. Charette's mere allegations, absent legal support, cannot void her criminal charges. *Mungia*, 119 S.W.3d at 816 (citing *Frye*, 897 S.W.2d at 330).

C. The District Court and Special Prosecutor Possess Jurisdiction

1. The District Court Holds Original Jurisdiction

The Washington County District Court properly holds original jurisdiction over Charette's charged offenses. Texas district courts hold jurisdiction over crimes of official misconduct. Tex. Code Crim. Pro. Ann. art. 4.05. Official misconduct includes intentional or knowing violations of a law committed by a public servant while acting in an official capacity as a public servant. Tex. Code Crim. Pro. Ann. art. 3.04. Charette stands charged with election crimes alleged to have been committed in Washington County while she was a candidate for public office. (CR 1). Therefore, the Washington County District Court serves as the appropriate court to preside over election crimes alleged to have been committed in Washington County, Texas.

2. The Special Prosecutor Holds Prosecutorial Jurisdiction

Charette's claims regarding how an absent TEC referral operates to restrict prosecutorial power remain unclear. Charette claims that the special prosecutor lacked "standing and authority" to prosecute; however, she fails to distinguish whether she claims that the special prosecutor lacked original jurisdiction or whether an absent referral merely restricts local prosecutors from exercising that jurisdiction. (Pet. Br. 8-10). Charette claims that a district attorney lacks "initial enforcement authority," which appears to be a claim that local prosecutors lack original jurisdiction over election crimes. (Pet. Br. 12). However, a page later, Charette then affirms that local prosecutors retain the decision to prosecute, but she claims that the exercise of that authority is bound by TEC decisions. (Pet. Br. 13).

Neither side raised, and this Court did not consider, cognizability issues with prosecutorial authority in *State v. Stephens*, --- S.W.3d ----2021 WL 5917198 (Tex. Crim. App. 2021) since the *Stephens* case addressed prosecutorial jurisdiction, not the exercise of discretionary authority. *Stephens*, at 2. At first blush, that may appear to make Charette's potential jurisdictional claims cognizable. However, even assuming that Charette raises a prosecutorial jurisdiction claim, then the special prosecutor holds original jurisdiction to

prosecute Charette's alleged crimes, and Charette asserts no law depriving the special prosecutor of said jurisdiction.

On page twelve of her brief, Charette seems to assert that the TEC holds exclusive initial jurisdiction over Charette's criminal charges and that the special prosecutor may not prosecute her without a referral from the TEC. (Pet. Br. 12). However, district and county attorneys derive their original jurisdiction to prosecute from the Texas Constitution, not the Texas Ethics Commission. Tex. Const. art. V, § 21. The law expressly grants Texas prosecutors full jurisdiction to prosecute election crimes. Tex. Const. art. V, § 21; Tex. Code Crim. Pro. Ann. art. 2.01, 2.02; *Stephens*, at 7, 8; *Brady v. Brooks*, 99 Tex. 366, 89 S.W. 1052, 1053, 1056 (1905). Charette relies on Texas Government Code § 571.171 to claim that the TEC bars prosecution; however, as examined above, § 571.171 never addresses nor limits county and district attorney jurisdiction over election crimes.

Austin County Criminal District Attorney Travis Koehn was duly appointed to serve as a special prosecutor in this matter (Pet. Br. Pg. 1); Tex. Code Crim. Pro. Ann. art. 2.07. He derives his jurisdiction as county attorney pro tem by statute, by the Texas Constitution, by the instant Court of Criminal Appeals, and by the Texas Supreme Court. Tex. Code Crim. Pro. Ann. art. 2.07; Tex. Const. art.

V, § 21; *Stephens*, at 7, 8; *Brady*, 89 S.W. at 1053, 1056. Charette ignores the tremendous weight of all applicable law and asks the Court to take the unfounded position that the Texas Ethics Commission, a civil enforcement agency, instead holds exclusive prosecutorial jurisdiction.

3. Prosecutorial Authority Claims Not Cognizable at Pretrial

If Charette instead claims that § 571.171 merely restricts a district or county attorney's authority to prosecute rather than granting exclusive prosecutorial jurisdiction to the TEC, then Charette's authority claim is best examined in post-conviction relief. Traditionally, a pretrial habeas claim may rest solely on the trial court's lack of power to try a defendant, not the prosecutor's lack of authority to prosecute. *Ex parte Smith*, 178 S.W.3d at 801; See *Ex parte Walsh*, 530 S.W.3d 774, 777–79 (Tex. App.—Fort Worth 2017, no pet.). Lower Texas courts have held that a cognizable pre-trial habeas writ may not rest on a lack of prosecutorial authority. See *Ex parte Walsh*, 530 S.W.3d at 777–79, no pet; *Miller v. State*, No. 11-07-00369-CR, 2008 WL 616121, at *1 (Tex. App.—Eastland Mar. 6, 2008, no pet.) (mem. op., not designated for publication); *Beavers v. State*, No. 2-05-448-CR, 2006 WL 3247887, at *6–7 (Tex. App.—Fort Worth Nov. 9, 2006, pet. ref'd) (mem. op., not designated for publication).

Assuming this Court found the claim in *Stephens* cognizable solely because it addressed jurisdiction, not authority, then Charette's claim regarding prosecutorial authority is not cognizable pretrial. Charette's claim that the special prosecutor improperly exercised his prosecutorial discretion creates, at most, a claim that her conviction is voidable, not void. A claim that a conviction would create a voidable judgment, as opposed to a void one, fails to present a cognizable basis for relief, per the reasoning in *Ex parte Becker*, 459 S.W.2d 442, 443 (Tex. Crim. App. 1970).

Becker argued that the grand jury was improperly impaneled when it returned indictments against him. *Ex parte Becker*, 459 S.W.2d at 443. The Court found that although a voidable conviction may arise when the grand jury lacks authority to indict, a cognizable pretrial writ may only rest on facially void convictions, not voidable ones. *Id.* Charette, then, resembles the defendant in *Becker*, who argued a right to be indicted by a properly constituted grand jury rather than a right not to be indicted at all. If Charette's claim rests on improper use of prosecutorial discretion, then her claim establishes, at best, a right to be tried with a TEC referral, rather than a right not to be tried at all. Allegedly defective authority to indict may not serve as the basis for cognizable pretrial habeas relief. *Id.*

D. Charette's Interpretation Creates Absurd Results

1. Charette's Interpretation Opens the Floodgates

Charette fails to address the absurd results that her proposed holding creates. If the Court were to find that civil enforcement authority or referral power alone confer exclusive prosecutorial jurisdiction, then the Court would utterly gut the Constitutional prosecutorial power of Texas district and county attorneys over countless crimes. In *Stephens*, this Court envisioned the extreme example of the Water Development Board gaining prosecutorial jurisdiction should the Court read legislative silence to equal a legislative intent to grant prosecutorial authority to the executive branch. *Stephens*, at 6. Charette's argument on page twelve of her brief creates exactly such an absurd result. Every Texas civil commission, civil department, and civil board with enforcement authority would also possess prosecutorial jurisdiction. Texas prosecutors would have to fight a pretrial habeas writ to establish a right to prosecute each time a civil executive branch agency could conceivably exercise its civil enforcement authority over the same acts.

If the Court were to find that statutory enforcement authority or referral power alone vests original jurisdiction in a state agency, then every criminal defendant who could argue that her case fell under some civil agency's purview

could challenge her prosecution in a cognizable pretrial writ alleging lack of local prosecutorial jurisdiction. Such a holding would open the floodgates to what should be a rare and most extraordinary remedy. *Ex parte Doster*, 303 S.W.3d at 724. The absurdity multiplies considering that each such claim would be doomed to fail on the merits. Such legislative attempts to delegate judicial branch prosecutorial jurisdiction to the executive branch of government constitute an unconstitutional violation of separation of powers. *Stephens*, at 6; *Martinez v. State*, 323 S.W.3d 493, 501 (Tex. Crim. App. 2010).

2. Other Agencies Have Similar Enforcement Provisions

Several civil administrative agencies possess generic enforcement authority similar to Texas Government Code § 571.171, and numerous crimes fall beneath their respective umbrellas. For example, the Texas Department of Health and Human Services may initiate enforcement actions against child-care facilities. Tex. Gov't Code Ann. § 531.0084. The executive director of the Texas Department of Licensing and Regulation may administer and enforce the department's programs related to occupational licensing. Tex. Occ. Code Ann. § 51.103. The Texas Department of Housing and Community Affairs may enforce laws related to housing migrant laborers. Tex. Gov't Code Ann. § 2306.931. By Charette's logic, such enforcement provisions alone would confer

exclusive prosecutorial jurisdiction on these civil administrative agencies unless and until the agency decides to delegate the authority to a local prosecutor. (Pet. Br. 12).

Holding that enforcement power alone vests prosecutorial jurisdiction in a civil agency creates the extreme examples that this Court anticipated in *Stephens*. A woman caught abusing children in an unlicensed day care could argue that she should not be prosecuted unless and until the Department of Health and Human Services permits it, per their authority to "initiate appropriate enforcement actions" in Texas Government Code § 531.0084. A real estate broker who defrauds investors could argue that he should not be criminally charged without the Texas Department of Licensing's blessing, per their authority to "enforce the department's programs" per Texas Occupations Code § 51.103. A defendant caught running a human trafficking operation out of a house could claim that he should not be prosecuted unless and until the Texas Department of Housing has weighed in on the merits of his criminal case, per their duty to "enforce this subchapter" in Texas Government Code § 2306.931. Charette's reasoning means that these civil agencies possess prosecutorial jurisdiction by way of enforcement provisions, and each of these defendants would possess cognizable pretrial habeas claims to contest the

prosecutorial jurisdiction of a district or county attorney in their cases. (Pet. Br. 12).

3. Other Agencies Have Similar Referral Provisions

The legislature has also tasked several civil agencies with reporting potential crimes to the appropriate law enforcement agency when warranted, similar to Texas Government Code § 571.171. Does Charette's reasoning extend to notification provisions, which are largely similar to referral provisions? If so, the Department of Family and Protective Services is required to "immediately notify the appropriate state or local law enforcement agency" of any report that concerns suspected child abuse or neglect. Tex. Fam. Code Ann. § 261.105. The Texas Education Agency must "notify the county attorney, district attorney, or criminal district attorney, as appropriate," if data reflects that a penal law has been violated. Tex. Educ. Code Ann. § 37.008 (m-1). The Texas Department of Environmental Quality's authority includes not only "enforcement actions" but also "referrals for criminal action," just like the TEC. 30 Tex. Admin. Code § 70.5. Adopting Charette's legal interpretation may grant exclusive prosecutorial jurisdiction to each of these agencies by implication alone.

If a state agency's notification or referral responsibilities equal exclusive prosecutorial jurisdiction, then an abusive parent could argue that Texas prosecutors lack jurisdiction unless the initial notice of the abuse came to law enforcement from the Department of Family and Protective Services. Tex. Fam. Code Ann. § 261.105. A teacher that assaulted a child in alternative school could claim that the district attorney lacked jurisdiction to prosecute absent notice from the Texas Education Agency Commissioner. Tex. Educ. Code Ann. § 37.008 (m-1). A defendant who intentionally poisoned the water supply in true supervillain fashion could escape prosecution, or at least significantly delay it, just by claiming that the TCEQ failed to send his case to local law enforcement before his indictment. 30 Tex. Admin. Code § 70.5. Again, by Charette's reasoning, each defendant could have cognizable claims regarding prosecutorial jurisdiction. (Pet. Br. 12).

ISSUE TWO: A COGNIZABLE PRETRIAL WRIT OF HABEAS CORPUS MAY NOT STAND ON IMPERMISSIBLE DUE PROCESS CLAIMS.

II. PETITIONER MAKES IMPERMISSIBLE DUE PROCESS CLAIMS

A. Due Process Claims are not Cognizable in Pretrial Habeas

Since a pretrial habeas claim may not be used to attack the merits of the State's case, Charette attempts to dress up her attacks on the sufficiency of the

evidence against her as a due process violation. (Pet. Br. 2). However, due process violations themselves generally may not serve as grounds for pretrial habeas relief specifically because due process grounds typically depend upon the evidence adduced at trial. *Ex parte Ingram*, 533 S.W.3d 887 (Tex. Crim. App. 2017); *Ex parte Walsh*, 530 S.W.3d at 778; *Ex parte Smith*, 185 S.W.3d 887, 893 (Tex. Crim. App. 2006); *In re Shaw*, 204 S.W.3d 9, 16 (Tex. App.—Texarkana 2006, pet. ref'd).

The Court in *Becker* found that a potential improper indictment, which Charette argues occurred here, created a voidable, not a void, conviction. *Becker,* at 443-44. The Court reasoned that harm and prejudice, essentially the facts of the particular case, would eventually determine the legitimacy of the indictment. Charette claims that she suffered harm here due to the lack of opportunity the TEC would have given her to remedy any violations. (Pet. Br. 14). Charette asks the Court, without facts, to simply presume such evidentiary issues would be settled in her favor. Whether the TEC would have sided with Charette or against her and whether the TEC would have decided to permit her an opportunity to cure violations or not, ultimately depends on the evidence of Charette's culpability—evidence not permitted to be raised in pretrial habeas claims.

A pretrial habeas claim is also generally barred when, as here, a defendant possesses a post-conviction remedy. *Ex parte Smith*, 185 S.W.3d 887, 893 (Tex. Crim. App. 2006). Even a severe violation of due process, such as denial of right to speedy trial, may not serve as a cognizable basis for a pretrial habeas claim, as it could be remedied post-trial. *Ex parte Hartfield*, 442 S.W.3d 805 (Tex. App.—Corpus Christi–Edinburg 2014, pet. ref'd). Where, as here, a determination of relevant facts requires speculation to resolve, then post-conviction relief, not pretrial relief, provides Charette the appropriate remedy. *Ex parte Smith*, 185 S.W.3d at 893. Therefore, Charette's due process claims cannot serve as a cognizable basis for relief.

B. Alternatively, Charette Received Criminal Due Process

Assuming *arguendo* that Charette's due process claims could be considered in pretrial habeas, Charette never asserts that the State denied her the standard criminal due process rights to which she was entitled, so she fails to establish due process grounds for a pretrial writ of habeas corpus. Charette has conceded that she received grand jury review prior to indictment. (Pet. Br. Pg. 4). Additionally, a criminal defendant may use an examining trial to attack the sufficiency of the State's evidence before indictment. *Taylor v. State*, 671 S.W.2d 535, 539 (Tex. App.—Houston [1st Dist.] 1983, no writ). Charette did not seek

an examining trial here, and the Grand Jury's indictment on all four charges renders an examining trial moot. *Gooden v. State*, 425 S.W.2d 645, 646 (Tex. Crim. App. 1968); *DeLeon v. State*, 758 S.W.2d 621, 623 (Tex. App.—Houston [14th Dist.] 1988, no pet.).

Charette never alleges that the State denied her of these rights to pretrial evidentiary review. Rather, Charette asks the Court to fashion a new interpretation of civil statutes which, she claims, would entitle her to an additional pretrial evidence sufficiency review by a civil agency. Her due process claims impermissibly center on factual determinations where the State is least able to present the facts.

C. Alternatively, Charette Forfeited Her Due Process Claims

1. Charette Chose Not to Involve the TEC

Even assuming Charette possessed a due process right to have the TEC evaluate the legality of her actions and assuming said due process right could form the basis of a cognizable claim, Charette forfeited any alleged right by failing to exercise it. A defendant may waive any rights afforded to her—even constitutional due process rights. *Wheeler v. State*, 628 S.W.2d 800, 802 (Tex. Crim. App. 1982); *Franks v. State*, 513 S.W.2d 584, 585 (Tex. Crim. App. 1974). Charette forfeited her right by choosing not to seek a TEC opinion pursuant to

Texas Government Code § 571.097. Although Charette could have used a favorable opinion as a legal defense at trial, Charette provided no proof that she ever sought an opinion. Charette never claims that the State interfered with her ability to exercise that right. As Charette apparently chose not to exercise her ability to request a TEC review of her claims, she cannot use the lack of a TEC review as a cognizable basis for a pre-trial habeas application.

Even now, Charette retains the ability to seek a TEC opinion as to the legality of her alleged election violations. Texas Government Code § 571.091 provides no deadline for Charette to seek such an opinion. However, a criminal defendant may logically choose not to exercise a due process right when a risk/benefit analysis indicates that the defendant may suffer more harm than good from the right's exercise.

2. Charette's Inaction Had Logical Benefits

Charette faced the risk of receiving civil enforcement penalties if she sought TEC involvement before her indictment. Tex. Gov't Code Ann. § 571.171. Although the State and Charette cannot present facts not in the record during a pretrial writ proceeding, it takes little effort to imagine hypothetical scenarios where Charette could face civil penalties from the TEC in addition to the criminal charges against her.

a. For example, if Charette had posted large campaign signs in Washington County which read, “Full-Time Judge Robbie Gail Charette for Judge” while Charette never held judicial office, then the TEC may have found that she violated Texas Election Code § 255.006, required her to remove the signs, fined her for failure to remove them, or both.

b. Likewise, if Charette waited to file her personal financial statement until the day before the election in violation of Texas Government Code § 572.027 and Texas Local Government Code § 159.056, despite requesting a copy of her opponent’s own timely filed personal financial statement from the county clerk soon after his filing, then the TEC may have required Charette to immediately file her financial statement, fined her for failure to timely file, or both.

c. If Charette personally financed her campaign, as she claims in page four of her brief, and spent upwards of $75,000.00 dollars on mailouts, entertainment, and a campaign consultant in a rural county election while regularly reporting that she spent $0.00 during her reporting terms, then the TEC could have required her to accurately report her campaign expenditures, fined her for failure to keep an accurate record in violation of Texas Election Code § 254.001, or both.

d. If Charette personally paid for numerous signs, mailouts, push-cards, and campaign communications, but she failed to disclose herself as the source and represented to the public that an independent committee bought them instead, then the TEC could foreseeably have required her to stop using the false campaign communications, ordered her to disclose the true source of all communications to the public as required by Texas Election Code § 255.004, fined her for the deception, or all of the above.

Furthermore, if evidence hypothetically showed that fellow local Republican party officials who were not running against Charette had warned her more than once that her conduct in these matters violated the law, then the TEC might consider that information as proof of bad faith on Charette's part. If evidence further showed that Charette expressly and repeatedly refused to cure her crimes despite the warnings of her peers, then the TEC might consider that as an intentional failure to remedy her violations. Aggravating factors such as these might influence the TEC to impose particularly stern sanctions since the seriousness of the violation, including the nature, circumstances, consequences, extent, and gravity, along with good faith and any attempts to remedy a violation must all be considered by the TEC during the imposition of sanctions under Texas Government Code § 571.177.

Depending on the actual evidence in Charette's case, Charette requesting a TEC review of the facts on her own could have been the most foolish decision she could have made. At best, Charette could hope that TEC involvement might somehow convince prosecutors not to indict her. Tex. Gov't Code Ann. § 571.097. At worst, Charette risked civil injunctions, fines, sanctions, and lawsuits from the TEC. Tex. Gov't Code Ann. § 571.171. Charette forfeited her right to TEC involvement when she opted not to request an opinion under Texas Government Code § 571.091. Exploring the actual evidence against Petitioner and any relevant impacts on her case requires a factual determination not possible or appropriate in a pretrial writ. As the Court in *Smith* said, "…we are not aware of any authority that would require the State to prove its case before this time." *Ex parte Smith*, at 893.

ISSUE THREE: A COGNIZABLE PRETRIAL WRIT OF HABEAS CORPUS MAY NOT STAND ON IMPERMISSIBLE COLLATERAL ATTACKS ON FACTUAL SUFFICIENCY.

III. PETITIONER SEEKS IMPERMISSIBLE COLLATERAL ATTACK

A. Charette Hides Factual Sufficiency Attacks in Due Process Claims

Charette's assertion that she has a due process right to have the TEC review her charges prior to indictment amounts to an impermissible pretrial attack on the sufficiency of the evidence. Long-settled law states that a petitioner may not collaterally attack the sufficiency of the evidence against her or the charging instrument in habeas corpus proceedings. *Ex parte Wingfield*, 162 Tex. Crim. 112, 282 S.W.2d 219 (1955); *Ex parte Wilson*, 374 S.W.2d 229 (Tex. Crim. App. 1964); *Ex parte Smith*, 571 S.W.2d 22 (Tex. Crim. App. 1978); *Ex parte Dantzler*, 571 S.W.2d 536 (Tex. Crim. App. 1978); *Ex parte McWilliams*, 634 S.W.2d 815 (Tex. Crim. App. 1980); *Ex parte Weise*, 55 S.W.3d at 620; *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010); *Ex parte Doster*, 303 S.W.3d at 724. If a non-cognizable claim is resolved on the merits in a pretrial habeas appeal, then the pretrial writ has been misused. *Ex parte Ellis*, 309 S.W.3d at 79. Charette seeks, without legal authority, to misuse the pretrial habeas process to

challenge the sufficiency of the evidence against her. Charette's due process claim hinges on the notion that the TEC would have barred any criminal charges against her after determining that the charges lacked sufficient evidence.

B. Charette Improperly Addresses Merits in Pretrial Habeas

Charette misuses pretrial habeas to attack the State's case by making factually unfounded and uncited claims that political opponents convinced the grand jury to improperly indict Charette. (Pet. Br. 1, 4). While Charette provides no proof for her baseless attacks on the integrity of the grand jury and the independent county attorney pro tem, her argument demonstrates Charette's intent to attack evidentiary sufficiency at a time when the State is hamstrung from presenting its evidentiary case. Where prosecution rests on a valid law, a defendant generally may not challenge the sufficiency of the indictment in pretrial habeas claims. *Ex parte Paxton*, 493 S.W.3d 292, 298 (Tex. App.—Dallas 2016, pet. ref'd); citing *Ex parte Perry*, 483 S.W.3d 884, 895 (Tex. Crim. App. 2016); *Ex parte Weise*, 55 S.W.3d at 620.

Charette further attacks the State's case by arguing that no appellate cases involving the instant offenses exist. Charette claims this lack proves that similar cases are never prosecuted and argues it as proof of prosecutorial over-

reach. (Pet. Br. 13). She provides no legal authority to establish this information's relevancy outside of an evidentiary sufficiency argument.

A district or county attorney derives his authority from the Constitution, not from the fact that others have successfully prosecuted a law. Tex. Const. art. V, § 21. If a prosecutor must first point to a prior successful prosecution of a law to successfully fend off a pretrial habeas attack, how could the first prosecution of any law begin? Here, too, Charette's position leads to absurd results.

Realistically, some criminal laws, though valid and prosecutable, may be sufficiently obscure or prosecuted infrequently enough not to result in an appellate record. For example, Title 8, subtitle B of the Texas Government Code establishes the Employees Retirement System of Texas, and § 811.101 of the code creates a criminal offense of fraud for illegal conversion of funds. However, it appears that no appellant has appealed his conviction under this statute. Does a lack of appellate cases for the offense mean that local prosecutors can never charge someone with defrauding the State retirement system? If the court accepts Charette's reasoning, then the necessary, yet logically untenable, answer would be "yes".

Charette now seeks the best of both worlds. She claims that the TEC would have exonerated her without risking them ever reviewing the evidence against

her. Using pretrial habeas to resolve a non-cognizable claim on the merits constitutes a gross misuse of the pretrial writ process. *Ex parte Ellis*, 309 S.W.3d at 79. Despite Charette's assertion that she would have benefited from an early, independent review of the facts in her case, Charette now seeks to abuse the legal process to do everything possible to prevent those facts from coming to light.

CONCLUSION

Charette proffered no valid law that entitles her to relief. Prosecutors possess constitutional and statutory authority to prosecute election law crimes, independent of any decisions made by the TEC. Charette's due process claims alleging entitlement to procedural protections available in TEC investigations are impermissible in pretrial habeas, and she forfeited any alleged due process rights. Charette ultimately moves the Court to quash her indictments due to lack of factual sufficiency—an impermissible ground for pretrial habeas relief.

PRAYER

Appellee respectfully prays this Honorable Court to uphold the trial court and appellate decisions and affirm the denial of Charette's applications for relief.

Respectfully submitted,

/s/ Brandy Robinson

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CERTIFICATE OF COMPLIANCE

I, Brandy Robinson, hereby certify that in compliance with Tex. R. App. P. 9.4(i)(1), according to Microsoft Word's word counting function, this document contains 7463 words.

Date: 05/10/2022

/s/ Brandy Robinson

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CERTIFICATE OF SERVICE

I, Brandy Robinson, hereby certify that a true and correct copy of the foregoing instrument has been served upon the Appellant by sending the same through email to her attorney of record, Lewis Thomas, at lewisthomaslaw@gmail.com.

Date: 05/10/2022

/s/ Brandy Robinson

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