

In the Texas Court of Criminal Appeals

ZENA COLLINS STEPHENS,
Petitioner,

v.

THE STATE OF TEXAS
Respondent.

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

EX PARTE ZENA COLLINS STEPHENS,
Petitioner.

BRIEF *AMICI CURIAE* OF STEVEN HOTZE, M.D., JARED WOODFILL (FORMER CHAIR FOR HARRIS COUNTY REPUBLICAN PARTY), HON. LOUIE GOHMERT (U.S. REPRESENTATIVE DISTRICT 1), HON. RANDY WEBER (U.S. REPRESENTATIVE DISTRICT 14), HON. BRIAN BABIN (U.S. REPRESENTATIVE DISTRICT 36), HON. LARRY TAYLOR (TEXAS STATE SENATE DISTRICT 11), HON. SID MILLER (TEXAS AGRICULTURAL COMMISSIONER), HON. DON HUFFINES (FORMER STATE SENATOR DISTRICT 16), HON. STEVE TOTH (TEXAS HOUSE MEMBER DISTRICT 15), HON. CECIL BELL, JR. (TEXAS HOUSE MEMBER DISTRICT 3), HON. TODD HUNTER (TEXAS HOUSE MEMBER DISTRICT 32), HON. VALOREE SWANSON (TEXAS HOUSE MEMBER DISTRICT 150), HON. DAN HUBERTY (TEXAS HOUSE MEMBER DISTRICT 127), HON. BRYAN SLATON (TEXAS HOUSE MEMBER DISTRICT 2), HON. BRISCOE CAIN (TEXAS HOUSE MEMBER DISTRICT 128), HON. KYLE BIEDERMANN (TEXAS HOUSE MEMBER DISTRICT 73), HON. DENNIS PAUL (TEXAS HOUSE MEMBER DISTRICT 129), HON. TOM OLIVERSON, M.D. (TEXAS HOUSE MEMBER DISTRICT 130), HON.

TAN PARKER (TEXAS HOUSE MEMBER DISTRICT 63), HON. CHARLES “DOC” ANDERSON (TEXAS HOUSE MEMBER DISTRICT 56), HON. MAYES MIDDLETON (TEXAS HOUSE MEMBER DISTRICT 23), HON. JAMES WHITE (TEXAS HOUSE MEMBER DISTRICT 19), HON. TONY TENDERHOLT (TEXAS HOUSE MEMBER DISTRICT 94), HON. LACEY HULL (TEXAS HOUSE MEMBER DISTRICT 138), HON. RICK GREEN (FORMER TEXAS HOUSE MEMBER DISTRICT 45), HON. ROBIN ARMSTRONG, M.D. (REPUBLICAN NATIONAL COMMITTEEMAN, TEXAS), HON. MOLLY WHITE (FORMER STATE REPRESENTATIVE DISTRICT 55), HON. DEBORAH KELTING (STATE REPUBLICAN EXECUTIVE COMMITTEE DISTRICT 7), HON. MARK RAMSEY (FORMER MEMBER STATE REPUBLICAN EXECUTIVE COMMITTEE DISTRICT 7), HON. GAIL STANART (STATE REPUBLICAN EXECUTIVE COMMITTEE DISTRICT 15), HON. GARY POLLAND (FORMER CHAIRMAN HARRIS COUNTY REPUBLICAN PARTY), HON. JOSH FLYNN (SECRETARY HARRIS COUNTY REPUBLICAN PARTY), HON. CINDY SIEGEL (CHAIR HARRIS COUNTY REPUBLICAN PARTY), CINDI CASTILLA (PRESIDENT, TEXAS EAGLE FORUM), BETH BIESEL (ELECTION INTEGRITY CHAIR FOR TEXAS EAGLE FORUM), HON. CATHIE ADAMS (FORMER CHAIR REPUBLICAN PARTY OF TEXAS), DR. RICK SCARBOROUGH (PRESIDENT, RECOVER AMERICAN), JOANN FLEMING (GRASSROOTS AMERICA EXECUTIVE DIRECTOR), DONALD ELLSWORTH, M.D., HON. KEITH NIELSEN (FORMER CHAIR FOR HARRIS COUNTY REPUBLICAN PARTY), WAYNE PENELLO, DARIN MAURER, ThM., RORY SEHON, JON MARSH, RICHARD KLUCZNIK, LUCILLE HOGER, HON. STAN STANART (FORMER HARRIS COUNTY CLERK), SHEREE H. FREDE, NORMAN D. FREDE, RANDY PRICE, GREG BLUME, CHAD URETSKY, VINCENT NATALE, DEBBIE SMITH, CLARK WHITLEY, STEPHANIE McCrARY, RICHARD HOTZE, AL VERA, COLLEEN VERA, JONATHAN HULIHAN, WESTON MARTINEZ, TERRY OWENS, GARY BRAUN, RICK VIDAURRE, LUZ SALAZAR, J.T. HORISZNY, HARRY McCULLOUGH, KAREN HENRY, JOANNA MARKS, JANET VARELA, TRAVIS GRIFFIN, STACEY BANDFIELD, REBECCA DIAZ, DIANA JILL HARTLAND, HOWARD J. LANG, D.O., F.A.A.E.M., D.A.O.B.F.P., D.E.B.E.M., RONALD W. GUIDRY, JOE GOODSON, STEVE KERNS, JOE MENSLAGE (OWNER KATY CHRISTIAN NEWSPAPER), MARK BARLOW, M.D., GARY MANGO, VIDAL MARTINEZ, CHARLIE HARTLAND, DAVE ROBERTS, RANDY COUNCILL IN SUPPORT OF THE STATE OF TEXAS’S MOTION FOR REHEARING

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INTEREST OF AMICI CURIAE

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related to election integrity and the prosecution of voter fraud in Texas. Through litigation, public policy advocacy, support of candidates, and education, Hotze has spent much of his life focusing on election integrity, in an effort to create free, fair, and equitable elections. Hotze and Woodfill have litigated numerous election law cases in courts, including, but not limited to, the Texas Supreme Court and the United States Court of Appeals for the Fifth Circuit.

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

If this court fails to reconsider its opinion in *Stephens v. State and Ex Parte Stephens*, election integrity will be forever compromised in the State of Texas and subject to the political leanings of local county and district attorneys.

For over seventy (70) years, the Texas Attorney General has had the authority to prosecute certain election-law violations. This Court, the Texas Supreme Court, the First Court of Appeals, and the Fifth Court of Appeals have previously concluded that the Attorney General's prosecutorial authority in election law cases was consistent with the Constitution. This Court recently reversed course in an opinion that rejects the wisdom of the Texas Legislature and the Texas Supreme Court. The opinion mistakenly interprets article IV, section 22's "other duties" clause and has lasting and broad consequences for the State, voters, candidates, and the separation-of-powers doctrine. The Court should reconsider its decision, vacate its judgment and affirm the denial of Stephens' pretrial habeas petition.

SUMMARY OF ARGUMENT

The Texas Supreme Court, the First Court of Appeals, and the Fifth Court of Appeals have held that the Texas Legislature may grant the Attorney General the authority to represent the State in the trial court, and the Court of Criminal Appeals has also presumed that the Legislature may give the Attorney General the authority to prosecute crime. *Brady v. Brooks*, 89 S.W. 1052, 1055 (Tex. 1905); *Saldano v. State*, 70 S.W.3d 873, 880 (Tex. Crim. App. 2002); *Medrano v. State*,

421 S.W.3d 869, 878-80 (Tex. App.-Dallas 2014, pet. ref'd); *State v. Stephens*, 608 S.W.3d 245 (Tex. App.-Houston, 2020, rev'd). [1st Dist.]

Here, the Attorney General is exercising the authority granted to him by the Texas Legislature to investigate and prosecute alleged violations of election laws. This Court's holding that Stephens' claim that this legislative grant of authority violates the separation-of-powers doctrine is contrary to precedent from the Texas Supreme Court, the Court of Criminal Appeals, and the Fifth Court of Appeals, all of which conclude that the Legislature can constitutionally grant the Attorney General the authority to represent the State in trial courts. Giving the Attorney General the ability to prosecute election-law violations does not remove any authority from the district and county attorneys, and this court's acceptance of Stephens' arguments calls into question all statutes that allow the Attorney General to represent the State in a trial court.

ARUGMENT

I. Texas Election Law

In Texas Election Code chapter 273, subchapter B, the Texas Legislature has given the Texas Attorney General the authority to investigate and prosecute violations of state election laws. Section 273.021 states:

- (a) The attorney general may prosecute a criminal offense prescribed by the election laws of this state.
- (b) The attorney general may appear before a grand jury in connection with an offense the attorney general is authorized to prosecute under Subsection(a).

The Legislature also made provision for venue in cases brought by the Attorney General under subchapter B. Such prosecutions may be brought in "the county in which the offense was committed or an adjoining county. *Id.* § 273.024.

II. The Attorney General's Prosecution of Election Law Violations Does Not Violate the Texas Constitution.

This Court concluded that section 273.021(a), which grants the Attorney General the authority to prosecute criminal election-law offenses, violates the Texas Constitution's separation-of-powers doctrine because the authority to prosecute lies exclusively with the judicial branch. More specifically, the Court concluded that the authority to prosecute crime belongs exclusively to district and county attorneys, who are members of the judicial branch, Tex. Const. art. V, § 21; therefore, the Legislature cannot grant the authority to prosecute crime to the Attorney General, who is part of the executive branch. But the premise of the argument has been rejected by both the Texas Supreme Court and this Court. If carried to its logical end, this Court's opinion would prohibit the Attorney General from appearing in a trial court on behalf of the State in nearly all cases. The Fifth Court of Appeals also rejected this argument. *See Medrano v. State*, 421 S.W.3d 869, 878-80 (Tex. App.- Dallas 2014, pet. refd). This Court should reconsider its ruling and do the same.

III. The Texas Constitution permits the Legislature to grant the Attorney General the authority to prosecute.

The Texas Constitution mandates separation of powers between the three

branches of government "except in the instances ... expressly permitted "within the Constitution. Tex. Const. art. II, § 1; *see also Meshell v. State*, 739 S.W.2d 246, 252 (Tex. Crim. App. 1987) (stating that one branch may exercise a power that would seem to belong to another branch when "authorized by an express provision of the Constitution"). To demonstrate a separation-of-powers violation, it is necessary to show that either (1) one branch of government has assumed or been delegated a power more properly attached to another branch, or (2) one branch of government is unduly interfering with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers. *Jones v. State*, 803 S.W.2d 712, 715 (Tex. Crim. App. 1991).

Under the Texas Constitution, the county and district attorneys are part of the judicial branch and shall "represent the State in all cases in the District and inferior courts in their respective counties[.]" Tex. Const. art. V, § 21. The Attorney General, a member of the executive branch, shall "represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party[.]" *Id.* art.IV, § 22. The Attorney General may also "perform such other duties as may be required by law." *Id.* Even Stephens admits that one branch can exercise the powers given to another branch when permitted by the Texas Constitution, Tex. Const. art. II, § 1; however, she denies that the "other duties" clause in the Attorney General's enumerated powers permits the Legislature to assign to the Attorney General powers belonging to the judicial branch. Multiple courts have rejected this argument and so too should this Court.

A. The "other duties" clause permits the Legislature to grant the Attorney General the authority to prosecute.

As early as 1905, the Texas Supreme Court held that article V, section 21 "d[oes] not deprive the Legislature of the authority to empower the Attorney General to bring suits on behalf of the state." *Brady v. Brooks*, 89 S.W. 1052, 1055 (Tex. 1905). The Court in *Brady* held that the lower court erred in "concluding that section 21 of article 5 of the Constitution manifests the intention to confer upon the county attorneys, or at the will of the Legislature the district attorneys, the exclusive authority to prosecute or defend every suit in the district and inferior courts, in which the state may be a party[.]" *Id.* Relying on the "other duties" clause in article IV, section 22, the *Brady* Court found it reasonable to believe that the framers of the Constitution and the voters who ratified it would have understood that the Legislature could grant to the Attorney General the authority to represent the State in lawsuits where his "services should be deemed requisite." *Id.* at 1056. The *Brady* Court further explained that those same individuals would have understood that the "other duties" clause would have enabled the Legislature to remove power from the district and county attorneys and give it to the Attorney General as long as the Legislature did not "practically ... destroy" the office of the district and county attorneys. *Id.*

The Supreme Court reiterated that holding, stating that the constitutional grant of authority to the district and county attorneys "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. Tex. Dep Jtofins.*, 937 S.W.2d 432,438 (Tex.1996) (citing *Brady*, 89 S.W. at 1055); *see also Smith v. State*, 328 S.W.2d 294, 295 (Tex. 1959) (per curiam) ("[I]t is clear that when the Legislature creates a new or additional cause of action in favor of the State it may also constitutionally authorize the Attorney General to prosecute such cause of action in both the trial and appellate courts of the State.").

The Court of Criminal Appeals in *Saldano v. State* has also recognized that "[the Texas Constitution] authorizes the legislature to give the attorney general duties which, presumably, could include criminal prosecution." 70 S.W.3d 873, 880 (Tex. Crim. App. 2002). The issue in *Saldano* was the Attorney General's authority to represent the State in the United States Supreme Court, and the Court's analysis is informative. This Court identified two sources for any such authority: the Texas Constitution *and* the Legislature. The Court found no "specific constitutional authority" giving the Attorney General the ability to represent the State in the Supreme Court but, as quoted above, the Court noted that the Legislature *could* give the Attorney General that authority. *Saldano*, 70 S.W.3d at 880. The Court then looked for statutory authority permitting the representation but found none. *Id.* Here, however, there is statutory authority permitting the representation: Texas Election Code section 273.021(a).

The Attorney General has had the authority to prosecute violations of election law since 1951. Act of May 30, 1951, 52d Leg., R.S., ch. 492, § 130(2),

1951Tex. Gen. Laws 1097, 1152; *see also Heathv. State*, No. 14-14-00532-CR, 2016 WL 2743192, at *3 (Tex. App.-Houston [14th Dist.] May 10, 2016, pet. rerd) (mem. op., not designated for publication) (recognizing Attorney General's statutory authority to prosecute election-law violations). Other grants of authority to the Attorney General to prosecute crime also exist. *See, e.g., Tex. Health & Safety Code* §§ 436.039, 571.021.

Finally, the Fifth Court of Appeals and the lower court has rejected this Court's reasoning and the very argument that Stephens is making here. *Medrano*, 421 S.W.3d at 878-80. Citing *Saldano*, *Brady*, *Meshell*, and *El Paso Electric*, the court concluded that the "other duties" clause in article IV, section 22, gave the Legislature the authority to enact section 273.021(a) and allow the Attorney General to prosecute election-law offenses. *Id.* As the court noted, granting the Attorney General this authority took nothing away from the district and county attorneys, who still retained the authority to prosecute election-law offenses. *Id.* at 879-80. By reaching a different conclusion, this Court created a split with the Fifth Court, which faithfully followed precedent from the Texas Supreme Court and Court of Criminal Appeals. It should be further noted that the First Court of Appeals opinion was consistent with *Saldano*, *Medrano* and *Brady*. *State v. Stephens*, 608 S.W.3d 245 (Tex. App.-Houston, 2020, rev'd). The trial court and the Court of Appeals correctly rejected Stephens' argument. This Court should do likewise.

B. Prosecution of criminal election-law offenses is not clearly a judicial-branch function.

Another problem with this Court's ruling is that courts have recognized that the line between the executive and judicial branches is often blurred, with each branch exercising authority that could also belong to the other. As the Texas Supreme Court stated,

"We attach no importance to the fact that the definition of the duties and powers of the Attorney General are placed in article 4, which is the article devoted to the executive department of the state government. The duties imposed upon him are both executive and judicial, that is, they are judicial in the sense, that he is to represent the state in some cases brought in the courts. The very name imports, even in ordinary language, that he is the chief law officer of the state and is that in use in all common-law statutes to designate such officer. So article 5, the judiciary article, embraces the definition of the duties of the sheriffs and clerks of the courts whose powers and duties are executive. Section 22 of article 4 might appropriately have been placed in article 5, and we think it should be construed precisely as if it had been so placed." (*Brady*, 89 S.W. at 1056.)

The Court of Criminal Appeals has likewise noticed that "some duties of county and district attorneys might more accurately be characterized as executive in nature[.]" *Meshell*, 739 S.W.2d at 253 n.9.

Despite the placement of the Attorney General in the executive branch, over half of his enumerated duties are judicial: representing the State in the Texas Supreme Court, "tak[ing] such action in the courts" as necessary to prevent private corporations from collecting taxes not authorized by law, and "seek[ing] ... judicial forfeiture" of certain charters. Tex. Const. art. IV, § 22. The Supreme Court in *Brady* correctly observed that, based on his enumerated

duties, the Attorney General could just as easily have been placed in the judicial branch. 89 S.W. at 1056.

Further, the Texas Constitution makes the Governor, a member of the executive branch, the ultimate authority to see that the laws of Texas are faithfully executed, Tex. Const. art. IV, § 10, even though most of the criminal prosecutions are carried out by members of the judicial branch. And the Secretary of State is a member of the executive branch, Tex. Const. art. IV, § 21, but is also the chief election officer of the State, Tex. Elec. Code § 31.001. Thus, enforcement of voting laws is also an executive branch function.

To demonstrate a separation-of-powers violation, it must be shown that either (1) one branch of government has assumed or been delegated a power more properly attached to another branch, or (2) one branch of government is unduly interfering with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers. *Jones*, 803 S.W.2d at 715. The Legislature did not delegate a power to the Attorney General more properly attached to another branch. Rather, in compliance with the "other duties", clause, the Legislature properly authorized the Attorney General to prosecute violations of election laws in Texas.

Further, the assignment of prosecution duties to the Attorney General does not "*unduly* interfere[], with the duties of the district and county attorneys such that they "cannot *effectively* exercise [their] constitutionally assigned powers." *See*

id. The Texas Supreme Court has described when that line might be crossed: if the Legislature "t[ook] away from the county attorneys as much of their duties as practically to destroy their office." *Brady*, 89 S.W. at 1056. But giving the Attorney General the concurrent authority to prosecute a limited class of criminal cases, election-law violations, does not "destroy" the office of the district and county attorneys. As recognized by the Fifth Court in *Medrano*, the district and county attorneys retain the independent authority to prosecute election-law violations. 421 S.W.3d at 879-80. Their authority remains intact and has not been given away to the Attorney General.

C. Allowing the Attorney General to Prosecute Election Law Violations Fosters Election Integrity

When the Legislature was considering whether to grant the Attorney General this authority, the Governor made a special plea to the Legislature, noting that local officials had been "unable to cope with problems arising out of [Texas] elections., H.J. of Tex., 52d Leg., R.S. 2023-24 (1951). The Fifth Court in *Medrano* also recognized that there may be "politically sensitive, cases in which it is advisable for the Attorney General to step in because local prosecutors might be discouraged from acting." 421 S.W.3d at 880.

Here, the Texas Rangers presented the results of their investigation of Stephens and others to the District Attorney of Jefferson County, that office

advised the Rangers to contact the Attorney General instead. 2.RR.78-77. If the Attorney General is not allowed to prosecute, Stephens' potentially illegal actions will likely remain unexamined by any official with prosecutorial authority. *See also Medrano v. State*, 421 S.W.3d. 869, 873 (Tex. App. – Dallas 2014, pet. Ref'd) (noting that the Dallas County Commissioners Court asked the Attorney General to investigate potential election fraud). This same pattern could play itself out every election cycle, potentially resulting in election integrity being compromised at the local, state, and national level.

The United States Supreme Court has held that States have “a compelling interest in preserving the integrity of [their] election process[es].” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (quoting *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)). Prohibiting the Attorney General to prosecute when, for whatever reason the district or county attorney does not, further compromises the integrity of Texas's elections.

D. This Court's current opinion threatens nearly all lawsuits in which the Attorney General represents the State in trial court.

Allowing this Court's current opinion to remain the law would have serious repercussions. The Legislature has enacted multiple laws giving the Attorney General the authority to bring criminal prosecutions. *See, e.g.*, Tex. Ins. Code § 86.051; Tex. Health & Safety Code § 436.039; *see also* Tex. Code Crim. Proc. art. 20.03. All of them would be unconstitutional under this Court's current view of the law.

PRAYER

This Court should grant the petition for rehearing, vacate the judgment entered on December 15, 2021, and affirm the judgment of the Court of Appeals.

Respectfully submitted,

/s/ Jared R. Woodfill

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CERTIFICATE OF SERVICE

On January 14, 2022, this document was served electronically on all counsel of record.

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CERTIFICATE OF COMPLIANCE

I, Jared Woodfill, Counsel for Amici Curiae certify that this document was generated by a computer using Microsoft Word which indicates that the word count of this document is 3,304. The typeset is Times New Roman 14 pt for text.

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