IN THE
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-16-0004-CR
No. 05-16-0005-CR
No. 05-16-0006-CR

EX PARTE WARREN KENNETH PAXTON, JR.

ON APPEAL FROM THE 416TH JUDICIAL DISTRICT COURT
COLLIN COUNTY, TEXAS
TRIAL COURT CAUSE NOS. 416-81913-2015,
416-82148-2015, 416-82149-2015

APPELLANT'S MOTION FOR REHEARING

Introduction

Pursuant to Rule 49.1 of the Rules of Appellate Procedure, Appellant, Warren Kenneth Paxton Jr., moves for rehearing of this Court's Opinion and Judgment issued June 1, 2016. Paxton raises one issue for rehearing:

1. ***Mens rea***. As the Court's Opinion states, issues of statutory construction are not ripe for review on a pretrial writ. Yet here, the Court rendered an advisory opinion erroneously construing the *mens rea* standard of § 581-29(I) of the Texas Securities Act without the benefit of briefing by the parties. It is crucial that this error be corrected. Where innocent behavior is criminalized based on surrounding circumstances, guilty knowledge must be proven as to the *circumstances* of the act, not only the act itself. This Court's Opinion suggests that Paxton's knowledge of any duty to register under § 581-29(I) of the Texas Securities Act is irrelevant. However, the act at

> issue—rendering services as an investment advisor representative—is innocent conduct made criminal only under particular circumstances. Specifically, § 581-29(I) provides that rendering services as an investment adviser representative is criminal only if done "without being registered *as required* by this Act." (Emphasis added). In other words, one acting as an investment adviser can be guilty of violating § 581-29(I) only if two circumstances are present: (1) he is not registered, and (2) he was required by the Act to register. Under this Court's precedents, guilty knowledge must be proven as to each of those circumstances. Did the Court err in misconstruing the culpable mental state required for a violation of § 581-29(I)?

Background

In August 2015, Paxton was indicted for, among other things, violating § 581-29(I). That provision makes it a crime to "[r]ender services as an . . . investment adviser representative without being registered as required by this Act." Thus, under the plain terms of § 581-29(I), merely rendering services as an investment adviser representative is not a crime, *nor* is it criminal to render services as an investment adviser representative without registering. In order to violate § 581-29(I), one additional circumstance is required, namely a duty to register. *See* TEX. CIV. STAT. § 581-29(I) (2010) ("without being registered *as required by this Act*" (emphasis added)). Section 581-29(I) itself does not specify the intent element that applies to each of the acts and circumstances that make up the offense defined in that provision.

Paxton made four applications to the district court for writs of habeas corpus challenging, among other things, his indictment under § 581-29(I). The district

court denied those applications. By interlocutory appeal, Paxton challenged the denial of his four applications. Included in those applications was Paxton's void for vagueness challenge premised on the failure of § 581-29(I) itself to set forth a culpable mental state. *See* Paxton Br. at 62-63. Importantly, Paxton did not ask this Court to construe § 581-29(I) to ascertain the precise culpable mental state required to violate the statute, *nor could he,* given that pretrial habeas is "not generally available 'to construe the meaning and application of the statute defining the offense charged.'" Court's Opinion at 12 (citing *Ex Parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010)).

The State responded, in one paragraph, that the lack of an articulated scienter requirement in § 581-29(I) did not render it unconstitutional because the Indictment alleged that Paxton acted knowingly and intentionally. *See* State's Br. at 61. The State did not request that the Court construe the meaning and application of the statute as it relates to *mens rea*. Given that neither party requested that the Court construe the meaning and application of the statute, neither brief analyzed the case law defining the required *mens rea* for violations of the Texas Securities Act, including the controlling decision in *Cook v. State*, 824 S.W.2d 634, 638 (Tex. App.—Dallas 1991). Nor was the issue explored at oral argument on Paxton's appeal.

This Court's Opinion issued on June 1, 2016. In its Opinion, the Court began by acknowledging that, pursuant to its decision in *Cook*, "rendering services as an investment adviser or investment adviser representative in violation of article 581-29 requires a culpable mental state involving the circumstances surrounding the conduct." Opinion at 20. But then contradicting this acknowledgement, the Court went on to state that § 581-29 does not require a culpable mental state as to one circumstance of a violation of that provision, namely the duty to register under the Texas Securities Act:

> The Texas Securities Act does not require one to know he must register if he intends to serve as an investment adviser representative. It is sufficient for the State to show that one knowingly rendered services as an investment adviser or investment adviser representative without being registered.

Id.

The Court's construction of the meaning § 581-29(I) and, in particular, its *mens rea* element, was beyond the scope of the Court's authority on an application for a writ of habeas corpus, particularly where neither party requested such a construction and where the construction was unnecessary to resolving Paxton's void for vagueness challenge. The Court's construction of § 581-29(I) is particularly problematic here because, without the benefit of thorough briefing on the issue, the Court misconstrued the applicable *mens rea* element. Paxton requests correction of this misstatement of the law.

Argument

1. The Court's statement concerning the interpretation of § 581-29(I) was outside the scope of a habeas proceeding.

"[W]hether a claim is even cognizable on pretrial habeas is a *threshold issue* that should be addressed before the merits of the claim may be resolved." *Ex Parte Barnett*, 424 S.W.3d 809, 810 (Tex. App. 2014—Waco, 2014) (emphasis added).

A pretrial application for habeas corpus is not available to "construe the meaning and application of the statute defining the offense charged." *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010). The Court's Opinion recognizes this where, in holding that Paxton's first issue was not cognizable, the Court explained that ruling on it would require the Court to both construe the relevant statute and apply it to particular circumstances notwithstanding an adequate remedy after trial. Opinion at 12-13 (citing *Ellis*, 309 S.W.3d at 79, *Ex parte Perry*, 483 S.W.3d 884, 895 (Tex. Crim. App. 2015) and *Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001). Yet the Court disregarded this same rule when it expounded on the *mens rea* requirement of § 581-29(I).

Paxton challenged the constitutionality of § 581-29(I) on vagueness grounds because that provision itself does not specifically articulate a *mens rea* standard. To overrule this issue, the Court could have simply cited TEX. PEN. CODE § 6.02 and held that, as with all Texas statutes that do not contain a *mens rea* standard, culpable knowledge is implied unless the statue "plainly dispenses" with a *mens*

rea element. TEX. PEN. CODE § 6.02(b). Instead, the Court went several steps further and rendered an advisory opinion on the culpable mental state required under § 581-29(I). Doing so was improper and unnecessary.

2. The Court's precedents require proof of a culpable mental state as to each of the circumstances required for a violation of § 581-29(I), including the existence of a duty to register.

Having now opined on the *mens rea* element of § 581-29(I), it is incumbent on the Court to do so accurately. The Court's statements here regarding the mental state element applicable to a violation of § 581-29(I) are particularly problematic because, Paxton respectfully submits, they are erroneous.

The Texas Penal Code provides that, "[i]f the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element." TEX. PENAL CODE § 6.02(b). The parties here agree that § 581-29(I) does not, on its face, prescribe a mental state.[1] But there is nothing in the text of § 581-29(I) plainly suggesting that the legislature intended to dispense with a mental element

[1] Paxton's opening appellate brief, in arguing that Section 581-29(I) is impermissibly vague, stated that "Section 581-29 lacks a scienter element." This is correct. But as Texas a Penal Code § 6.02(b) makes clear, a culpable mental state "is nevertheless required unless the definition of the offense "plainly dispenses with any mental element." As Paxton argued in his appellate brief, §581-29(I) "fail[s] to plainly dispense with a culpable mental state." Brief at 62. This means that strict liability is *not* intended and a culpable mental state is required. *See* Tex. Penal Code § 6.02(b). The Court appears to have misunderstood a typographical error in the brief as a concession that the offense required no mental state on the failure to register element. *See* Opinion at 19 ("Appellant contends that the failure of the statute to articulate a culpable mental state indicates that strict liability must have been intended. We agree . . . ."). No such concession was intended. In any event, a concession by a party cannot alter the meaning of the statute intended by the legislature. *See Oleksy v. Farmers Ins. Exch*., 410 S.W.3d 378, 383 (Tex. App.—Houston [1st Dist.], 2013) ("Because the interpretation of a statute is a question of law that this court determines de novo, we are not bound to accept the parties' agreed but mistaken interpretation of law.")

for the offense. *See* TEX. CIV. STAT. ART. 581-29(I). Thus, a culpable mental element is required to prove a violation of § 581-29(I). The question is what the conduct element is to which that culpable mental state applies.

The Texas Penal Code "delineates three 'conduct elements' which may be involved in an offense: (1) the nature of the conduct; (2) the result of the conduct; and (3) the circumstances surrounding the conduct." *McQueen v. State*, 781 S.W.2d 600, 603 (Tex.Crim.App. 1989) (en banc). It is these conduct elements to which the required culpable mental state applies. *Id.* Of particular relevance here, "where otherwise innocent behavior becomes criminal because of the circumstances under which it is done, a culpable mental state is required as to those surrounding circumstances." *Id.*

As the Court's Opinion here notes, a violation of the Texas Securities Act is one "that requires a culpable mental state involving the circumstances surrounding the conduct." Opinion at 20 (citing *Cook v. State*, 824 S.W.2d 634, 638 (Tex. App.—Dallas 1991). Because the Texas Securities Act is a "circumstances" offense, guilty knowledge must attach to the circumstances of the act, rather than the act itself. *Cook*, 824 S.W.2d at 638. Reasoning that dealing in securities is in and of itself a legal activity, *Cook* stated that "a violation of the Securities Act is an offense dealing with the 'circumstances surrounding the conduct,' and the culpable

mental state of 'knowingly' *must apply to those surrounding circumstances*." *Id*. at 638-39 (emphasis added).

Section 581-29(I) of the Texas Securities Act provides that otherwise innocent conduct – namely, "rendering services as an . . . investment adviser representative" – is a criminal violation only if two additional circumstances are present: first, the investment adviser must be unregistered; and, second, there must exist under the Texas Securities Act a duty of the investment adviser representative to register. Absent both of these circumstances, acting as an investment adviser representative is not a crime. In other words, rendering services as an investment adviser representative, even an unregistered one, is not a crime absent the additional circumstance of a duty of that representative to register. *See* TEX. CIV. STAT. § 581-29(I) ("without being registered *as required by this Act*" (emphasis added)).

This last circumstance is of critical importance here because not every investment adviser or investment adviser representative rendering services in Texas is required to register. Indeed, the Texas Securities Act itself provides for registration exemptions and authorizes the Texas Securities Board to adopt additional exemptions. *See* TEX. CIV. STAT. ART. 581-12(B), (C) (2010). Pursuant to Texas Securities Board rules, an investment adviser representative need not register if he renders advice in Texas but does not have a place of business in

Texas and is a representative of an investment adviser that is not required to register with the Texas Securities Board. 7 TEX. ADMIN. CODE § 116.1(b)(2)(B). One example of an investment adviser that need not register with the Texas Securities Board is an adviser that is registered with the U.S. Securities and Exchange Commission. *Id.* § 116.1(b)(2)(A)(ii).

The Court here suggested that no *mens rea* was required as to the duty to register circumstance of an offense under § 581-29(I) of the Texas Securities Act. Specifically, the Court stated that a criminal violation of § 581-29(I) requires only that a defendant knowingly render advice while not registered, regardless of whether or not the defendant has knowledge of a duty to register. Opinion at 19-20. The Court appears to have based this conclusion on the belief that "[t]he act prohibited by article 581-29(I) is the rendering of services as an investment adviser representative without being registered." Opinion at 20. But that is incorrect. Rendering services as an unregistered investment adviser representative is not a crime ***unless*** an additional circumstance is present, namely a duty on the part of the investment adviser representative to register. *See* TEX. CIV. STAT. § 581-29(I) ("without being registered *as required by this Act*" (emphasis added)). And, as explained above, there are any number of scenarios under which no such duty to register exists. Because the duty to register is the precise circumstance that turns the innocent act of rendering services as an unregistered investment advisor

representative into a crime, knowledge must attach to the *duty to register* and not simply the act of rendering of services as an unregistered investment advisor representative. *See Cook*, 824 S.W.2d at 638-39.

3. The Court's statements regarding *mens rea* misapply *Robinson v. State* and *Tovar v. State*.

Neither case that the Court cites to support its *mens rea* analysis actually supports the Court's conclusion. In fact, the Court's parenthetical explanation of the ruling in *Robinson v. State* accurately states the *opposite* conclusion, namely that a "'circumstances of conduct' offense requir[es] proof of culpable mental states of knowledge or recklessness only on [the] duty-to-register element of [the] offense." Opinion at 20 (citing *Robinson v. State*, 466 S.W.3d 166, 171-72 (Tex. Crim. App. 2015)).

In *Robinson*, the Court of Criminal Appeals noted that the "circumstances surrounding the conduct" relate to the "duty-to-register element" of the statute. *Robinson*, 466 S.W.3d at 172. Thus, it concluded that "[t]o sustain [Defendant's] failure-to-comply conviction, the statute requires that [Defendant] (1) knew or was reckless about *whether he had a duty to register* . . ., and (2) failed to report in person to the local law-enforcement authority." *Id*. at 173 (emphasis added). This Court misinterprets *Robinson* to conclude the opposite, finding that the offense requires proof of culpable mental state on the *act of rendering services*. Opinion at 20.

Further, the Court's reliance on *Tovar v. State* is misplaced, as the statutory analysis used in that case is inapposite. Specifically, the Court of Criminal Appeals in *Tovar* interpreted a statute that expressly provided for the culpable mental state of "knowing" in the statute itself. *See Tovar v. State*, 978 S.W.2d 584, 586 (Tex. Crim. App. 1998) (citing TEX. GOV. CODE § 551.144). Because this culpable mental state was provided for in the statute itself, the Court in *Tovar* conducted a statutory analysis of § 551.144 "based upon the plain language . . . and the rules of grammar and common usage." *Id*. at 587. The Court concluded that because the subclause containing "knowingly" was independent of the subclause "if a closed meeting is not permitted," the defendant's "mental state with respect to whether the closed meeting is permitted" was not a factor in determining whether the Defendant violated the statute. *Id*. at 586-87. Clearly, the statute at issue in this case, § 581–29(I), contains no mention of a culpable mental state. Accordingly, a "plain language" and "common usage" analysis, similar to that undertaken by the *Tovar* court, is not appropriate in this case.

Conclusion

As a general rule, an opinion of this Court on an application for a writ of habeas corpus is not a proper vehicle for construing the meaning or application of a criminal statute. Here, however, the Court has chosen to construe the *mens rea* element of § 581–29(I). Having chosen to construe that element, it is of utmost

importance to this matter that the Court do so correctly. For the reasons set forth above, the Court, without the benefit of prior briefing on the issue, erroneously construed the *mens rea* element of § 581–29(I). Accordingly, Paxton respectfully requests that the Court rehear this case and correct that error.

Respectfully submitted,

Dan Cogdell
Co-Lead Counsel
Cogdell Law Firm, L.L.C.
402 Main Street
Fourth Floor
Houston, Texas 77002
Telephone: (713) 426-2244
Facsimile: (713) 426-2255
dan@cogdell-law.com

Terri Moore
300 Burnett St., Ste. 160
Fort Worth, TX 76102-2755
Telephone: (817) 877-4700
moore@terrimoorelaw.com

HILDER & ASSOCIATES, P.C.

/s/ Philip H. Hilder
Philip H. Hilder
State Bar No. 09620050
Co-Lead Counsel
Q. Tate Williams
State Bar No. 24013760
Paul L. Creech
State Bar No. 24075578
819 Lovett Blvd.
Houston, Texas 77006
Telephone: (713) 655-9111
Facsimile: (713) 655-9112
philip@hilderlaw.com
tate@hilderlaw.com
paul@hilderlaw.com

Heather J. Barbieri
Barbieri Law Firm, P.C.
1400 Gables Court
Plano, Texas 75075
Telephone: (972) 424-1902
Facsimile: (972) 208-2100
hbarbieri@barbierilawfirm.com

Bill Mateja
Polsinelli, P.C.
2950 N. Harwood, Suite 2100
Dallas, Texas 75201
Telephone: (214) 292-4008
mateja@polsinelli.com

J. Mitchell Little
Scheef & Stone, LLP
2600 Network Blvd., Ste. 400

Frisco, TX 75034
Telephone: (214) 472-2100
Facsimile: (214) 472-2150
mitch.little@solidcounsel.com
OF COUNSEL

ATTORNEYS FOR APPELLANT
WARREN KENNETH PAXTON, JR.

CERTIFICATE OF CONFERENCE

On June 15, 2016, I contacted Mr. Brian Wice regarding this Motion and he indicated that he is opposed.

/s/ Philip H. Hilder
Philip H. Hilder

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2016, a true and correct copy of the above and foregoing Motion was served on all counsel of record via the electronic case filing service provider contemporaneous with electronic filing.

/s/ Philip H. Hilder
Philip H. Hilder