

**NO. WR-86,920-02**

IN THE

COURT OF CRIMINAL APPEALS

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**IN RE THE STATE OF TEXAS Ex REL. BRIAN WICE, RELATOR.**

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ON STATE'S PETITION FOR WRIT OF MANDAMUS  
AGAINST THE FIFTH COURT OF APPEALS

IN CAUSE NOS. 416-81913-2015; 416-82148-2015; 416-82149-2015  
OF COLLIN COUNTY, TEXAS

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**AMICUS CURIE BRIEF IN SUPPORT OF  
RELATOR'S PETITION FOR WRIT OF MANDAMUS**

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Kent Schaffer  
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Collin County Criminal District Attorney *Pro Tem* Brian Wice

### **Respondent:**

Court of Appeals Fifth District of Texas at Dallas

### **Real Party in Interest:**

Collin County Commissioners Court

### **Counsel for Real Party in Interest:**

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### **Real Party in Interest:**

Warren Kenneth Paxton, Jr.

### **Trial Judge:**

Honorable George Gallagher  
416th Judicial District Court  
Collin County, Texas

Honorable Robert Johnson  
177th Criminal District Court  
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## **AMICUS CURIE BRIEF IN SUPPORT OF RELATORS**

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Now comes, Nicholas “Nico” LaHood, District Attorney of Bexar County, Texas, David Escamilla, Travis County Attorney, John F. Healey, Jr., Fort Bend District Attorney, Margaret M. Moore, Travis County District Attorney, and Lisa McMinn, former State’s Prosecuting Attorney, and files this amicus brief in support of the Relators.

### **I. Statement of the Case**

This is an original mandamus proceeding brought by the Relator Brian Wice, Collin County Criminal District Attorney Pro Tem, under Tex. R. App. P. 72. In his petition, Relator asks this Court to compel the Respondent, the Fifth Court of Appeals, to vacate its August 21, 2017, order in trial court cause numbers 416-81913-2015, 416-82148-2015, and 416-82149-2015, *State of Texas v. Warren Kenneth Paxton, Jr.*, directing Judge George Gallagher to vacate his January 4, 2017, “Second Order on Payment of Attorney’s Fees to Attorneys Pro Tem” approving a second set of interim requests for pre-trial compensation for work performed in these matters in 2016. *In re Collin County, Texas, and County Commissioners*, \_\_\_ S.W.3d \_\_\_, 2017 WL 3587108 (Tex. App.—Dallas August 21, 2017)(orig. proceed.).

## **II. Issue Presented for Mandamus Relief**

The sole ground for mandamus relief is whether the Fifth Court of Appeals clearly abused its discretion granting mandamus relief on the issue of first impression of whether the Collin County district judges exceeded their authority in adopting Local Rule 4.01B.

## **III. Statement of Facts & Procedural History**<sup>1</sup>

In April of 2015, the Public Integrity Unit of the Texas Rangers forwarded a formal complaint against Texas Attorney General Ken Paxton for alleged violations of the State Securities Act. Pursuant to Tex. Govt. Code art. 411.0255(b), Collin County District Attorney Greg Willis filed a request on April 20, 2015, recusing his office in this investigation. Pursuant to art. 2.07(a) of the Texas Code of Criminal Procedure, Collin County Local Administrative Judge Scott Becker appointed criminal lawyers Brian Wice and Kent Schaffer to serve as attorneys *pro tem*, agreeing to pay them \$300 an hour for their professional services pursuant to Local Rule 4.01B which permitted judge's to vary from the fee schedule in unusual circumstances or where the fee would be manifestly inappropriate because of circumstances beyond the control of the appointed counsel. A third attorney *pro tem*, Nicole DeBorde, was appointed by Judge Gallagher in September 2015.

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<sup>1</sup> The following statement of facts is taken primarily from Relators' brief in this matter.



In July 2015, a Collin County grand jury indicted Paxton for three felonies: two counts first-degree felony securities fraud and one count of third-degree failure to register as an investment advisor in the manner required by the State Securities Act. Over the next seven and one-half months, the Special Prosecutors incurred considerable expenses and engaged in extensive work that included responding to over a dozen pre-trial writs and motions filed by Paxton’s 12-member legal team, and traveling to Collin County for multiple hearings. Tarrant County District Judge George Gallagher, assigned to these cases when the Collin County District Judges recused themselves, Slip Op.3 n. 1, denied all Paxton’s pre-trial motions and writs. The court of appeals affirmed Judge Gallagher’s rulings and this Court refused Paxton’s petitions for discretionary review. *See Ex parte Paxton*, 493 S.W.3d 292 (Tex. App.—Dallas 2016, pet. ref’d)(en banc).

The Special Prosecutors submitted requests for interim payment in December 2015, pursuant to their agreement with Judge Becker, who “apparently relied [on Rule 4.01B] when he reached the fee agreement with the attorneys *pro tem*.” Slip op. 3. In December 2015, Paxton filed an “Objection to Excessive or Interim Payment of Fees to Attorneys Pro Tem,” challenging the Special Prosecutors’ fees and claiming that the Special

Prosecutors' payment for all pre-trial matters should be capped at \$1,000 per case. Judge Gallagher overruled Paxton's motion challenging these fees and signed an order requiring the Commissioners to pay it. In January 2016, the Commissioners approved the Special Prosecutors' fee payments by a vote of 3-2. Slip op. 4.

In 2016, the Special Prosecutors devoted considerable time and incurred considerable expenses in these three felony cases. Their work included filing an appellate brief and presenting oral argument in the court of appeals in the pre-trial writ matters; responding to Paxton's petition for discretionary review in this Court; responding to Paxton's motions to dismiss and an exhaustive motion for change of venue that was granted after multiple hearings. Judge Gallagher granted the State's motion, finding that an influential group of Paxton's supporters had engaged in a protracted attempt to taint the Collin County jury pool by attacking the Special Prosecutors, the victims, and Judge Gallagher in electronic, print, and social media. *See* n. 5, *supra*.

Additionally, in 2016, Jeffery Blackard, sued the Special Prosecutors multiple times "on behalf of the taxpayers of Collin County". After the court of appeals dismissed Blackard's last lawsuit, the Commissioners sought mandamus relief in the court of appeals against Judge Gallagher. After

calling for a response, the court of appeals granted mandamus relief on August 21, 2017. Paxton's third-degree felony trial is set to begin on December 11, 2017.

#### **IV. Summary of the Argument**

The Fifth Court of Appeals incorrectly interpreted art. 26.05 of the Texas Code of Criminal Procedure and the court's opinion undermines the ability of private attorneys appointed as *pro tems* to fulfill their obligations as prosecutors. The Court's finding that a rule adopted by local criminal judges that permits variances from the set fee schedule in special or unusual circumstances is void discourages qualified attorneys from accepting the appointment or forces them to choose between their own financial interests and their responsibilities as prosecutors. It also gives local county commissioners the ability to effectively end a criminal prosecution.

#### **V. Argument**

Relator has provided this Court with ample argument and authorities to support his claim for relief. Rather than repeat those arguments here, this brief will focus on the public policy implications of the Fifth Court of Appeals' opinion in deterring competent attorneys from accepting appointments as attorneys *pro tem*.

The Texas Code of Criminal Procedure provides not only for the appointment of attorneys *pro tem*,<sup>2</sup> but also for the compensation of certain *pro tems*. See Tex. Code Crim. Proc. Ann. art. 2.07(c)(West 2005). Specifically, if the *pro tem* is not already an attorney for the state, he or she “shall receive compensation in the same amount and manner as an attorney appointed to represent an indigent person.” *Id.*

Compensation for attorneys appointed to represent indigent defendants is governed by art. 26.05 of the Code. The article mandates that the attorney “be paid a *reasonable attorney’s fee* for performing... services, based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel... .” Tex. Code Crim. Proc. Ann. art. 26.05(a)(West 2009)emphasis added). In addition to requiring reasonable compensation, the article also requires that the judges of county courts, statutory county courts, and district courts trying criminal cases adopt a fee schedule and that all payments be made in accordance with that fee schedule. Tex. Code Crim. Proc. Ann. art. 26.05(b) & (c)(West 2009). The adopted fee schedule is required to “state reasonable fixed rates or minimum and maximum hourly rates, taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys

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<sup>2</sup> Tex. Code Crim. Proc. Ann. art. 2.07(a) (West 2005).

willing to accept the stated rates... ." Tex. Code Crim. Proc. Ann. art. 26.05(c)(West 2009).

In accordance with article 26.05, the local Collin County criminal court judges adopted a fee schedule that included a provision for "unusual circumstances." Specifically, Local Rule 4.01B provided that the "judge presiding over a case may authorize payment to appointed counsel that varies from the fee schedule in unusual circumstances or where the fee would be manifestly inappropriate because of circumstances beyond the control of the appointed counsel." *In re Collin County*, Slip. Op. at \*3. This provision is consistent with article 26.05's overriding mandate of providing reasonable compensation to appointed attorneys.

By adopting Rule 4.01B, the Collin County judges built into the fee system a mechanism to avoid the potential problems that arise when appointed counsel is inadequately compensated. Perhaps the most obvious danger of inadequate compensation is that "quality attorneys will stay away from the indigent-defense system due to the economic incentives of private representation." Bill Piat, *Reinventing the Wheel: Constructing Ethical Approaches to State Indigent Legal Defense Systems*, 2 St. Mary's J. Legal Mal. & Ethics 372, 404 (2012); see also Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render Ineffective*

*Assistance of Counsel*, 68 IND. L.J. 363, 365 (1993) (Inadequate pay leads to a major problem of not being able to attract “qualified attorneys to act as court-appointed counsel for the indigent.”). While a general fee schedule may work appropriately in most cases, having a provision for special circumstances avoids injustice in “unusual” cases. After all, it is often the unusual cases that require the most skilled and qualified attorneys and these are the very attorneys who are most likely to decline the representation without adequate compensation. See Piat, at 390, 404 (explaining that experienced lawyers often will not accept court appointments).

And even when attorneys accept the representation, inadequately compensated counsel “may lack the motivation to spend the many hours required in preparing a case.” Klein, at 368. Studies have concluded that low fees result in inadequate case preparation. *Id.* (citing Mark Curriden, *Indigent Defense in the South: Begging for Justice*, A.B.A. J., Jan. 1991, at 64, 67). Inadequate pay for indigent defense creates a situation where lawyers “are likely to focus their energies on their paying clients because of the far greater income produced.” *Id.* (citation omitted).

The Fifth Court Appeals holding could also result in “a conflict of interest between the attorney and his client.” *Id.* at 374. That is, once the

attorney “has spent the number of hours on a case that warrants the maximum compensation, it will be to the attorney’s financial detriment to continue to vigorously represent the client’s best interest.” Such a situation is more likely to arise in a complex or unusual case. Collin County’s Rule 4.01B prevents the conflict by allowing an attorney to request additional compensation in appropriate cases.

Inadequate compensation is not only a problem for lawyers representing indigent defendants; it is also a concern for private attorneys appointed to represent the state in a criminal prosecution as *pro tems*. In fact, the unique obligations and duties of prosecutors create a greater risk for problems.

Whenever an elected district or county attorney is disqualified or is otherwise unable to perform the duties of the office, the Texas Code of Criminal Procedure authorizes the appointment of a competent attorney to perform the duties of the office. *See* Tex. Code Crim. Proc. Ann. art. 2.07(a) & (d)(West 2005). Statutorily, these duties include assisting grand juries and representing the State in criminal cases in the courts of the jurisdiction. *See* Tex. Code Crim. Proc. Ann. art. 2.01 (West 2005) (“Each district attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom”); Tex. Code Crim. Proc.

Ann. art. 20.03 (West 2015) (“Attorney representing the State entitled to appear”); Tex. Code Crim. Proc. Ann. art. 20.04 (West 2015) (“Attorney may examine witnesses”); Tex. Code Crim. Proc. Ann. art. 20.05 (West 2015) (“grand jury may send for the attorney representing the state and ask his advice upon any matter of law or upon any question arising respecting the proper discharge of duties.”). While the Code lists some of the duties of a prosecutor, the listed duties are not comprehensive nor do they reflect the full scope of the prosecutor’s job or obligations.

Unlike most lawyers, the “prosecutor occupies a unique role in our criminal justice system... .” *Young v. United States ex. Rel. Vuitton et Fils S.A.*, 481 U.S. 787, 826 (1987) (Powell, J., concurring in part and dissenting in part). The primary responsibility of most attorneys is to act as an advocate for his or her client. The “primary duty of all prosecuting attorneys, *including any special prosecutors*, [is] not to convict, but to see that justice is done.” Tex. Code Crim. Proc. Ann. art. 2.01 (West 2005)(emphasis added). “This overriding duty falls upon the prosecutor in his capacity as the State’s representative in criminal matters.” *Duggan v. State*, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989). “As a trustee of the State’s interest in providing fair trials, the prosecutor is obliged to illuminate the court with the truth of the cause, so that the judge and jury



may properly render justice.” *Id.* The Supreme Court has “recognized that the prosecutor’s role transcends that of an adversary: he ‘is the representative not of an ordinary party to a controversy, but of a sovereignty... whose interest... in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Thus, prosecutors “are charged with different responsibilities and ethical duties.” Nicole L. Phillips & Stephen Smith, *Reinterpreting the Ethical Duties of a Prosecutor: Y-STR as a Model Investigatory Tool*, 22 GEO. J. LEGAL ETHICS 1073, 1082 (2009).

Prosecutors have “the inherent power or discretion to initiate investigations, to point the power of a grand jury at an individual, to seek charges from a grand jury, to decide after charging whether to drop some or all charges, to offer the option of a plea to a lesser offense, and to recommend a range of or a specific punishment.” Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict Of De Facto Client/Attorney Relationships*, 48 S. TEX. L. REV. 695, 703 (2007). Additionally, “prosecutors have taken an increasingly active role in the investigatory phase of criminal cases.” Phillips & Smith, at 1083-84. “Many, if not most, significant investigatory decisions require the

involvement of the prosecutor.” *Id.* “The prosecutor’s vast investigative role includes seeking warrants and grand jury subpoenas, overseeing undercover operations, ordering surveillance of witnesses, making plea bargains in exchange for investigative assistance or testimony, and obtaining non-testimonial items of physical evidence... .” *Id.* In short, prosecutors are required to spend a considerable amount of time and effort even before a criminal charge has been filed in a court.

The time and effort spent on the prosecution does not end once the indictment or information has been returned. Prosecutors have ethical obligations under Brady and Rule 3.09 of the Texas Rules of Disciplinary Conduct and must also comply with the requirements of art. 39.14. As one learned commentator noted, this statute “redistributes the burden of discovery” on the prosecution and “creates a virtually automatic disclosure duty.” Gerald S. Reamey, *The Truth Might Set You Free: How The Michael Morton Act Could Fundamentally Change Texas Criminal Discovery, Or Not*, 48 TEX. TECH L. REV. 893, 905 (2016). To fulfill these obligations, obligations which continue and extend beyond a final conviction, a prosecutor is required to be proactive and not simply rely on information provided by law enforcement. Again, this takes time and effort. And this

must be done in every single case, regardless of whether the end result is a plea bargain, a dismissal, or a full trial.

The *pro tem* must also be prepared to respond to the numerous motions that can be filed by the defense. Such motions include motions to set aside the indictment or information<sup>3</sup> motions for continuance,<sup>4</sup> motions to suppress evidence,<sup>5</sup> and motions for change of venue.<sup>6</sup> And since the prosecutor has no control over whether a defendant will accept a plea offer, at some point the *pro tem* will have to be prepared to go to trial. This means interviewing every state's witness, reviewing every piece of evidence, and anticipating and preparing for potential defenses.

The Fifth Court of Appeals opinion in this case undermines the ability of private attorneys appointed as *pro tems* from fulfilling their obligations as prosecutors. This has the unintended effect of either discouraging qualified attorneys from accepting the appointment or forcing them to choose between their own financial interests and their responsibilities as prosecutors. It also creates a situation where the local county commissioners can effectively stop a criminal prosecution.

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<sup>3</sup> See Tex. Code Crim. Proc. Ann. art. 27.03 (West 2006); Tex. Code Crim. Proc. Ann. art. 28.01 § 1(4) (West 2006).

<sup>4</sup> See Tex. Code Crim. Proc. Ann. art. 28.01 § 1(5) (West 2006).

<sup>5</sup> See Tex. Code Crim. Proc. Ann. art. 28.01 § 1(6) (West 2006).

<sup>6</sup> See Tex. Code Crim. Proc. Ann. art. 28.01 § 1(9) (West 2006).

## **VI. Conclusion**

Because of variances in demographics, population density, and other relevant factors, a “one-size-fits-all” approach to indigent defense compensation is not practical. See Tex. Task Force On Indigent Def. & The Spangenberg Grp., *Blueprint For Creating A Public Defender Office In Texas* 25-43 (2d ed. 2008). The legislature recognized this fact and amended Article 26.05 to allow local criminal courts to have control over how attorneys representing the indigent and the state (as attorneys *pro tem*) were compensated in their jurisdictions. The judges of Collin County decided that reasonable compensation required making allowances for unusual cases and adopted Rule 4.01B. If this Court holds, like the Fifth Court of Appeals, that local judges cannot allow for special circumstances, then this Court will actively discourage qualified attorneys from accepting appointments as *pro tems* and effectively give commissioners control over criminal prosecutions. This is unacceptable given the critical role prosecutors have in our criminal justice system.

## **VI. Prayer for Relief**

Amicus Curies asks this Court to issue a writ of mandamus to vacate Respondent's decision and order of August 21, 2017, and to enforce Judge Gallagher's Second Order on Payment of Attorneys' Fees to Attorneys Pro Tem of January 4, 2017.

Respectfully submitted

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**Certificate of Compliance**

I, Enrico B. Valdez, Assistant Criminal District Attorney, Bexar County, Texas, certify pursuant to Tex. R. App. P. 9.4(i)(3) that this brief contains 4,251 words according to the word count of the computer program used to prepare the brief.

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**Certificate of Service**

I, Enrico B. Valdez, Assistant Criminal District Attorney, Bexar County, Texas, certify that a copy of the foregoing Amicus Curiae Brief in Support of Relators was served mail, facsimile, and/or electronically on this 27th day of October 2017, to the following:

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