No. WR-86,920-02

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**In re The State of Texas ex rel. Brian W. Wice, Relator**

On Petition for Writ of Mandamus

# Brief for the Texas Criminal Defense Lawyers Association as *Amicus Curiae* Supporting Relator

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# Identity of Parties and Counsel

Pursuant to Rule 38.1(a), Rules of Appellate Procedure ("Tex.R.App.Pro."), the following is a complete list of the names and addresses of all parties to the trial court's final judgment and their counsel in the trial court, as well as appellate counsel, so the members of the Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision in the case and so that the Clerk of the Court may properly notify the parties to the trial court's final judgment or their counsel, if any, of the judgment and all orders of the Court of Appeals.

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## Statement of the Case

The parties have adequately stated the nature of the case.

## Issues Presented

By Relator: The 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.

By the Respondent: Did the Fifth Court of Appeals clearly abuse its discretion when it conditionally granted mandamus relief on the issue that the Honorable Judge George Gallagher did not have lawful authority to order payment of fees at variance with the Art. 26.05 fee schedule adopted by the Collin County district judges exercising criminal jurisdiction?

By Amicus Curiae: Whether the Constitution of the United States, Article 26.05, C.Cr.P., and/or Section 4.01B of the Collin County Indigent Defense Plan, a rule which has been adopted by 166 Texas counties, permit a judge to pay an attorney a fee which varies from the "schedule of fees adopted by formal action of the judges of the county courts," in "unusual circumstances or where the fee would be manifestly inappropriate because of circumstances beyond the control of the appointed counsel."

## Statement Pursuant to Rule 11, Tex.R.App.Pro.

The Texas Criminal Defense Lawyers Association ("TCDLA") is a non-profit, voluntary membership organization dedicated to the protection of those individual rights guaranteed by the state and federal constitutions, and to the constant improvement of the administration of criminal justice in the State of Texas. Founded in 1971, TCDLA currently has a membership of over 3,400 and offers a statewide forum for criminal defense counsel, providing a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases, as well as seeking to assist the courts by acting as *amicus curiae*.

Neither TCDLA nor any of the attorneys representing TCDLA have received any fee or other compensation for preparing this brief, which brief complies with all applicable provisions of the Rules of Appellate Procedure, and copies have been served on all parties listed above.

No. WR-86,920-02

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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# Brief for the Texas Criminal Defense Lawyers Association as *Amicus Curiae* Supporting Relator

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, the Texas Criminal Defense Lawyers Association, *Amicus Curae*, and respectfully submits this *amicus curiae* brief supporting Relator. Relator's case is one of extreme significance to the bench and bar in Texas, because, if the Court of Appeals' opinion in the cases below are permitted to stand, it will effectively prevent the judiciary from being able to appoint qualified lawyers in difficult cases, as they will be limited to what can be paid to lawyers so appointed, regardless of the County. TCDLA, mindful of its purpose of both ensuring individual rights

and the furtherance of the administration of criminal justice, would therefore show the Court as follows:

## Facts of the Case

TCDLA takes no position on the facts, other than to note that nothing in the State's response takes issue with the facts as alleged by Relator. Thus, TCDLA shall rely on Relator's statement of facts in this brief.

## Issue as Framed by *Amicus Curae* Restated

**Whether the Constitution of the United States, Article 26.05, C.Cr.P., And/or Section 4.01B of the Collin County Indigent Defense Plan, a Rule Which Has Been Adopted by 166 Texas Counties, Permit a Judge to Pay an Attorney a Fee Which Varies from the "Schedule of Fees Adopted by Formal Action of the Judges of the County Courts," in "Unusual Circumstances or Where the Fee Would Be Manifestly Inappropriate Because of Circumstances Beyond the Control of the Appointed Counsel."**

## Jurisdiction

The threshold question in any original mandamus proceeding is whether the Court has original jurisdiction to entertain relator's application for writ of mandamus. Under Article V, Section 5(c), of

the Texas Constitution, the Court of Criminal has jurisdiction to issue writs of mandamus "in criminal law matters" ("Subject to such regulations as may be prescribed by law, the Court of Criminal Appeals and the Judges thereof shall have the power to issues the writ of *habeas corpus*, and, in criminal law matters, the writs of mandamus, procedendo, prohibition, and certiorari"). As this case involves the interpretation of Article 26.05, C.Cr.P., there is no doubt that the case is a criminal law matter.

## Arguments & Authorities

In its opinion on the mandamus application of the Collin County Commissioners ("the Commissioners"), the Court of Appeals held that the "law at issue in this case plainly prescribes that all payments made to appointed attorneys in criminal cases be 'paid in accordance with a schedule of fees' that includes fixed rates or minimum and maximum hourly rates." ***In re Collin County Commissioners***, _____ S.W.3d _____ (Tex.App. - Dallas; Nos. 05-17-00634-CV, No. 05-17-00635-CV, and No. 05-17-00636-CV; August 21, 2017)(slip op. at 10). The Court

further determined that Article 26.05, C.Cr.P., "does not permit the judges to expand on that authority by adopting what is essentially an 'opt out' provision allowing a judge to individually set a fee rate that falls outside the range of what has been collectively agreed to as reasonable." ***In re Collin County Commissioners***, slip op. at 7. Rejecting the idea that Section 4.01B of the Collin County Indigent Defense Plan permits a judge to pay any attorney any fee which exceeds the "schedule of fees adopted by formal action of the judges of the county courts," the Court of Appeals concluded that the Hon. George Gallagher,[1] "had no authority to order payment of fees in violation of article 26.05." ***In re Collin County Commissioners***, slip op. at 10).

TCDLA believes that rules like Collin County local rule 4.01B are important parts of Texas' plan for providing quality indigent defense. Because the Court of Appeals' opinion finds that local rule 4.01B violates Article 26.05, it will have a serious negative

[1] A district court judge in Tarrant County, was assigned to preside over the prosecutions giving rise to the instant case, after the district judges in Collin County recused themselves from all matters involving these cases.

impact on indigent defense in Texas. For the reasons stated herein, the opinion of the Court of Appeals in ***In re Collin County Commissioners*** cannot be permitted to stand.

I

## Texas' Separation of Powers Empowers the Judiciary as the Sole Branch with Ultimate Authority and Responsibility to Secure Counsel for Indigent Defendants.

### A. Courts Have Inherent and Implied Authority to Order Compensation as a Necessary Component of Securing Court-appointed Counsel; Statutes That Minimize this Authority Violate the Judiciary's Integrity and Independence.

The original petition filed by the attorneys *pro tem* carefully stops short of stating what should be acknowledged: trial courts have implied, inherent, and constitutional power to order compensation of court-appointed attorneys. Legislative attempts to regulate that authority violates the separation of powers.

> The separation of powers doctrine, properly understood, imposes on the judicial branch not merely a negative duty not to interfere with the executive or legislative branches, but a positive responsibility to perform its own job efficiently. This positive aspect of separation of powers imposes on courts affirmative obligations to assert and fully exercise their powers. To operate efficiently by modern standards, to protect their independent status, and to fend off legislative or

executive attempts to encroach upon judicial prerogatives. From that responsibility arises an inherent power of courts to require that they be reasonably financed.

* * *

Each branch in its own sphere must be free to govern, manage, and administer its business without restriction, supervision, or interference by the other two branches. To the extent that any branch becomes subservient to another, the capacity of the subservient branch to function as a "check and balance" against the dominant branch is curtailed. This is particularly true where the legislative branch makes the judiciary its supplicant by unreasonably curtailing judicial appropriations.

* * *

From the case law can be gleaned this working definition: Inherent powers consist of all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. These powers are inherent in the sense that they exist because the court exists; the court is, therefore it has the powers reasonably to act as an efficient court.

Inherent judicial powers derive not from legislative grant or specific constitutional provision, but from the fact that it is a court which has been created, and to be a court requires certain incidental powers in the nature of things.

Hon. Jim R. Carrigan, ***Inherent Powers of the Courts***, 24 JUVENILE JUSTICE, May 1973, 38, 39-40 (cited with approval in ***State Bar of Texas v. Gomez***, 891 S.W.2d 243, 245 (Tex. 1994).

Judge Carrigan's article is replete with references throughout American jurisprudence. To highlight a few:

- The "inherent and constitutional authority to employ necessary personnel to perform its inherent and constitutional functions" -- specifically the authority to appoint a probation officer and set his salary. ***Carrigan***, *supra*; citing ***Noble County Council v. State***, 234 Ind. 172, 125 N.E.2d 709, 713 (Ind. 1955).

- "Where 'conventional sources do not provide necessary funds, the court does have inherent authority to do those things essential to the performance of its inherent and constitutional functions.'" ***Carrigan***, *supra*; citing ***State ex rel. Weinstein v. St. Louis County***, 451 S.W.2d 99 (Mo. 1970).

- The co-equal branch of the Judiciary "'must possess rights and powers co-equal with the functions and duties, including the right and power to protect itself against any impairment thereof.'" This includes the "'inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer justice . . .'" ***Carrigan***, *supra*; citing ***Commonwealth ex rel. Carroll v. Tate***, 442 Pa. 45, 52 (1971).

- "'The legislature has no power or authority to curtail and hamper the courts in the exercise of their lawful duties'" the inherent power of the court includes the "'power and authority to order paid the reasonable and necessary expenses of such assistance.'" ***Carrigan***, *supra*; citing ***Dunn v. State ex rel. Corydon***, 204 Ind. 390, 184 N.E. 535 (1933).

- The court possess inherent authority to order payment of items "'necessary to the exercise of its constitutional

jurisdiction . . .'" ***Carrigan***, *supra*; citing ***State ex rel. Kitzmeyer v. Davis***, 68 P.2d 689, 690-691 (1902); see also ***In re Courtroom and Officers of Circuit Court***, 134 N.W. 490 (1912).

- "'It is abhorrent to the principles of our legal system and to our form of government that courts, being a co-ordinate department of government, should be compelled to depend upon the vagaries of an extrinsic will. Such would interfere with the operation of the courts, impinge upon their power and thwart the effective administration of justice. These principles, concepts and doctrines are so thoroughly embedded in our legal system that they have become bone and sinew of our state and national polity.'" ***Carrigan***, *supra*; citing ***Smith v. Miller***, 384 P.2d 738, 741 (1961).

These notions have been acknowledged by American Courts since the beginning of American jurisprudence: "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution." ***United States v. Hudson***, 11 U.S. 32, 34 (1812). Moreover, because the Sixth Amendment constitutionally entitles one charged with crime to the effective assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a court's authority to deprive an accused of his life or liberty. ***Johnson v. Zerbst***, 304 U.S. 458 (1958).

The Texas Supreme Court has described these inherent powers as "woven into the fabric of the constitution by virtue of their origin in the common law and the mandate of Article II, Section 1, of the Texas Constitution, regarding separation of powers between the three co-equal branches." ***Eichelberger v. Eichelberger***, 582 S.W.2d 395, 398 (Tex. 1979). The ***Eichelberger*** court categorized these powers into "implied" and "inherent.[2]"

> The Inherent judicial power of a court is not derived from legislative grant or specific constitutional provision, but from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities. The inherent powers of a court are those which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity. Inherent power of the courts has existed since the days of the Inns of Court in common law English jurisprudence. Nevitt v. Wilson, 116 Tex. 29, 285 S.W. 1079, 1083 (1926); People ex rel. Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928). It also springs from the doctrine of separation of powers between the three governmental branches. Tex.Const. Art. II, Sec. 1. This power exists to enable our courts to effectively perform their judicial functions and to protect their dignity, independence and integrity.

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[2] Our federal courts similarly recognize categories of inherent powers with great attribution to federal separation of powers on which the Texas model is based. In the federal system these powers are categorized as: (1) core inherent powers fundamental to the essence of a court and existing merely by virtue of its creation, (2) inherent powers "necessary to the exercise of all others," and (3) inherent powers "reasonably useful to achieve justice." ***In re Stone***, 986 F.2d 898, 901 (5th Cir. 1993).

***Eichelberger***, 582 S.W.2d at 398. As distinguished from the inherent judicial power, the Court explained:

> The Implied powers of a court do not stand on such an independent basis as those described as inherent. Though not directly or expressly granted by constitutional or legislative enactment, implied powers are those which can and ought to be implied from an express grant of power.

***Eichelberger***, 582 S.W.2d at 399;. See also ***Gomez***, 891 S.W.2d at 245.

In Texas, as elsewhere, inherent and implied powers of trial courts include the ability to order reasonable compensation of persons necessary to fulfilling the court's constitutional responsibilities. In ***Vondy v. Commissioners Court of Uvalde County***, 620 S.W.2d 104 (Tex. 1981), a case involving court-ordered compensation of an elected constable, the Texas Supreme Court left no room for reasonable disagreement. The court explained: [t]he legislative branch of this state has the duty to provide the judiciary with the funds necessary for the judicial branch to function adequately." ***Vondy***, 620 S.W.2d at 110. Recognizing that the power of the purse is the power to render a nullity, our courts subscribe to the rationale that inherent

authority to compel funding is necessary "to prevent any interference with or impairment of the administration of justice." ***Vondy***, 620 S.W.2d at 110; See also ***Commissioner's Court of Lubbock County v. Martin***, 471 S.W.2d 110 (Tex.Civ.App. Amarillo 1971)(similar rationale involving court-ordered compensation of probation officers).

The Texas Supreme Court reaffirmed the duty of courts to utilize inherent powers to "safeguard the proper administration of justice," as recently as 2017. ***Henry v. Cox***, 520 S.W.3d 28, 37 (Tex. 2017). However, trial courts must exercise this duty judiciously.

In a lawsuit to restore a district court's coordinator after her firing by the commissioners court a separate district court ordered the administrator reinstated at her previous salary. This order conflicted with the Legislature's delegation of authority to set court administrator salary ranges in commissioners courts. ***Henry***, 520 S.W.3d at 36-37. The Supreme Court found that the order overstepped, making clear that the use of inherent judicial power

must be in response to something more pernicious to the "proper administration of justice" than the firing of a court administrator.

There is an undeniable abundance of strong words favoring the invocation of inherent powers under the appropriate circumstances. Our courts continue to recite and analyze their meaning, so as to dust them off for eventual use. The line for when the invocation of such powers becomes appropriate may be nothing more than a Potter Stewart-like standard of "I know it when I see it." See ***Jacobellis v. Ohio***, 378 U.S. 184, 197 (1964). On one side of that line are a set of certain core functions of the judiciary that remain sacrosanct.

This case does not call upon this Court to delineate. It invokes judicial functions at the center of the core: the duty to provide due process and the protection of constitutional guarantees. The cases of ***Gideon v. Wainwright***, 372 U.S. 335 (1963), and ***Ake v. Oklahoma***, 470 U.S. 68 (1985), have been thrust squarely before this Court and their dictates bear recitation. The right to counsel and an indigent defendant's right to appointed counsel are among

the federal constitutional protections which state courts are charged with protecting through the Fourteenth Amendment's guarantee of due process in state proceedings. They are "fundamental and essential to a fair trial" and a "fair system of justice." ***Gideon*** 372 U.S. at 342-344 (1963). These Truths are evident not only in law but in logic and reason:

> Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

***Gideon***, 372 U.S. at 344 (emphasis added).

Two decades later, in ***Ake***, the Supreme Court revisited the Constitution's guarantee of "meaningful access to justice" and recognized the obligation to provide the assistance of a competent psychiatrist. ***Ake***, 470 U.S. 68, at 77. The Court reiterated the fundamental right of a fair opportunity to present a defense and the right of defendants to "an adequate opportunity to present

their claims fairly within the adversary system." ***Ake***, 470 U.S. at 77-76; citing ***Ross v. Moffitt***, 417 U.S. 600, 612 (1974).

To ensure this outcome the Court mandated an obligation to pay for the "basic tools of an adequate defense or appeal" when defendants cannot afford to pay for them. ***Ross***, 417 U.S. at 612; citing ***Britt v. North Carolina***, 404 U.S. 226, 227 (1971). This "basic tools" rationale has been applied to all variety of third-party assistance for which judges routinely exercise inherent authority and order compensation. ***Rey v. State***, 897 S.W.2d 333 (Tex.Cr.App. 1995).

As this Court subsequently made clear, the ***Ake*** requirement of ensuring a "reasonably level playing field at trial" is not subject to the Legislature's preference; it is the duty of a trial court in ensuring due process in an adversarial system. ***De Freece v. State***, 848 S.W.2d 150, 159 (Tex.Cr.App. 1993). The Legislature's infringement into this area is no different than it is in the context of free speech, unreasonable search and seizure, or the right to confrontation. Indeed, it was the inherent power of the judiciary

that provided Clarence Gideon a lawyer even though the State of Florida's legislature deemed it inappropriate.

It appears the Texas Legislature has made a good faith effort to create legislation responsive to the mandates of ***Gideon*** and ***Ake*** through the enactment and subsequent revisions of Article 26.05, C.Cr.P. Here, as in many pieces of legislation, less than a one-to-one ratio exists between the scenarios the Legislature must account for and the scenarios the judiciary encounters. Much like the Fifth Court of Appeals' description of the Collin County plan in this case, Article 26.05 works -- until it doesn't. When it doesn't -- and when the court cannot appropriately fulfill its duties through delegated authority, it has the inherent power to do so. ***In re Stone***, 986 F.2d 898, 902 (5th Cir. 1993); citing ***Ex parte Peterson***, 253 U.S. 300, 312 (1920).

A majority of district court judges from over 168 counties have recognized a unique category of cases that is unaddressed by the current iteration of Article 26.05, C.Cr.P.[3] These are the

[3] See Relator's brief, P. 14.

occasional and unanticipated cases requiring the appointment of uniquely qualified attorneys willing to set aside a significant portion of their usual practice to adequately represent an indigent client.[4] When these cases come along, the problems with strict adherence to a rigid indigent defense plan are evident with only a cursory knowledge of supply and demand. Without the ability to pay a reasonable market rate in these rare circumstances, courts are effectively without power to fulfill their constitutional obligation under ***Gideon***.[5] This is precisely the scenario where the use of implied and inherent powers is envisioned -- when necessary to administer justice and function effectively.

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[4] The Waco Biker Shootout at Twin Peaks is a relevant example outside of the instant case. That case involves more than 150 defendants, terabytes of evidence, *habeas corpus* writs, bond hearings, examining trials, interlocutory appeals and inevitable litigation before this Court. It has necessitated the employment of attorneys from across this state. With over two years of pretrial litigation, the first of many trials did not begin until October 9, 2017. See *"**Jury Selection to Begin in First Twin Peaks Case**;"* Waco Tribune; October 9, 2017.

[5] The Court need look no further than the instant case for proof. As would be expected, many are anticipating a possible resignation of the attorneys *pro tem* in the instant case should the defunding tactics of the Collin County Commissioners prove successful. Claudia Lauer, ***Unpaid Bills Put Trial of Texas Attorney General in Limbo***," ABC News, Mar. 29, 2017.

There is also sound logic beyond this. County-level indigent defense plans are acts of legislation. Though enacted by judges – they are presumably enacted by majority rule and without the requirement of regular revision. This lends itself to the possibility of a number of unacceptable scenarios from the perspective of an individual judge with an individual duty to protect the constitution, including:

- A majority of judges setting an inappropriately low hourly rate;
- A majority of judges setting fixed rates for ordinary cases and failing to account for extraordinary cases;
- A majority of judges failing to address an outdated indigent defense plan that does not account for inflation, changes in demographics and availability of qualified attorneys.

In no other context is an individual judge's duty to give substance to constitutional protections subject to the consent of that judge's colleagues. Nor should it be when a judge fulfills his duty to secure an appointed attorney.

Since ***Gideon***, it has become axiomatic that few things are more important to the integrity of the judicial process than

representation by an attorney. The judges cannot be subservient to the Legislature or even their colleagues in ensuring this occurs. To the extent Article 26.05 operates as a limitation on a judge's authority to secure counsel for an indigent defendant, it is sufficiently pernicious to the administration of justice that it calls for the use of the court's inherent and implied powers. Because the Fifth Court of Appeals' ruling reverses a compensation order arising from the exercise of these powers the requested mandamus relief should be granted.

### B. Texas' Separation of Powers Is Not a Shield Behind Which a Commissioner's Court May Hide from an Obligation to Fulfill Trial Court Orders to Compensate Appointed Attorneys.

In their original brief to the Dallas Court of Appeals, the Commissioners attempted to invoke the separation of powers doctrine to avoid the payment of court appointed attorney fees. The Commissioners claim a general and independent power to determine the appropriateness of fees owed by the county. Because the sole obligation of determining an appropriate fee for appointed counsel belongs to a trial court, a trial court's

fulfillment of this obligation cannot violate the separation of powers.

District courts and commissioner courts are both creations of Article V of the Texas Constitution. Within section 8 of that article, which governs the judiciary, district courts are vested with "supervisory control over the County Commissioners with such exceptions and under such regulations as may be provided by law. The Legislature delegates to commissioner courts certain legislative functions and sometimes these legislative functions are protected Texas's limited but constitutionally mandated separation of powers. ***Commissioners Court of Shelby County v. Ross***, 809 S.W.2d 754, 757 (Tex.App. - Tyler 1991).

Article II, section 1, of the Texas Constitution, which delineates the separation of powers, provides:

> Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

The Legislature has never delegated to commissioner courts the authority to review and refuse to pay court-appointed attorney

claims. The enumerated functions of a commissioners court are listed in the Texas Constitution[6] or in statutes[7] In their original mandamus before the Fifth Court of Appeals, the Commissioners attempt to derive a general authority from penumbras and emanations of legislative functions that simply do not exist. They claim, without authority, to have the power to act as a check and balance upon the district court's ability to order compensation.[8] They attempt to derive power to refuse claims approved by the auditor under their authority to audit and settle accounts under section 114.021, of the Local Government Code.[9]

The Commissioners seemingly attempt usurp the auditor's authority to "examine" and "approve" under sections 113.064 and

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[6] The authority to the authority to assess and collect taxes is found in Article III, sections 48-e, 52d; Article VII, section 6; and Article VIII, sections 8 and 14. The authority to dispose of property is found in Article III, section 49-b; while the authority call certain elections is found in Article XVI, section 44.

[7] The creation of a county budget, determination of the number of county employees, employee compensation and payment of expenses, are located in Tex. Loc. Gov't Code Ann., sections 111.001 to 111.095 (budget authority); and sections 151.001 to 152.907 (county employees).

[8] See the Commissioners' brief in the Court below, page 20.

[9] See the Commissioner's brief in the court below, page 21.

113.065, of the Local Government Code.[10] These attempts fall short of identifying an actual delegated legislative function protected by the separation of powers. A plain reading of the relevant statutes reveals that it is the auditor who "examines" and "approves" and upon such approval the commissioners court has a ministerial duty to "settle" the account.[11]

Even if the Legislature had delegated to the commissioners court discretion to refuse claims in general matters, the Legislature has chosen specific procedures which apply to compensation of court-appointed counsel. The procedures set out in Article 26.05 delegate discretion to the district courts and ministerial tasks to commissioner courts, and, as discussed above, the legislation merely attempts to give substance to an already existing constitutional duty of criminal courts.

Specifically, in Article 26.05(b), the Legislature delegated to district courts the task of adopting a "schedule of fees" for

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[10] See the Commissioner's brief in the court below, pages 23-24.

[11] "To pay (money that is owed); to liquidate (a debt) <she settled her accounts>." SETTLE, Black's Law Dictionary (10th ed. 2014).

compensating attorneys, while, under Article 26.05(c), t]he duty to review the appropriateness of a bill and approval of payment is the duty of an individual trial court judge "presiding over the proceedings." Finally, as set out in Article 26.05(f), once a payment is approved by an individual trial court judge it "shall be paid from the general fund of the county in which the prosecution was instituted . . .."

The Tyler Court of Appeals has described the common-sense outcome when the Legislature delegates traditional legislative functions to a county body other than the commissioners court.

> The Legislature, which is the source of the commissioners courts' legislative authority, has chosen to limit that authority in the matter at hand by expressly providing that [it is subject to another branch's authority].

***Shelby County***, 809 S.W.2d at 757. This is precisely what the Legislature did when it enacted Article 26.05, C.Cr.P.

With this issue "all roads lead to Rome." The Commissioners' separation of powers argument fails because it requires this Court to provide that power from nonexistent authority. The Commissioners' separation of power argument also fails because

it claims authority which is delegated to the judiciary through the Texas Constitution and the Texas Legislature. Whichever the case, the argument is without merit. In anticipation that the Commissioners will revive this argument before this Court, this court should treat it accordingly.

II

**A Hole Created by a Void Provision of an Indigent Defense Plan Is Filled with the Inherent Authority of the Court, Not Another Inapplicable Section of the Plan.**

This case may be decided on narrower grounds. The Court may assume, without deciding, the voidness of the relevant provision of the Collin County indigent defense plan and focus solely upon the remedy.

By the enactment of Section 4.01 of the Collin County Indigent Defense Plan, the Collin County district judges divided all criminal cases into two broad categories: *ordinary cases* where attorneys are compensated according to a fee schedule under 4.01A, and *extraordinary cases* where attorneys are to be compensated according to judicial discretion pursuant to 4.01B.

If the provision for extraordinary cases at issue is void -- then there is a hole in the Collin County plan.

It would be contrary to logic and reason to require attorneys in extraordinary cases compensated pursuant to an inapplicable provision for ordinary cases. Simply put, there are certain cases, which because of the complexity, such as the instant case, which require the most qualified attorneys be appointed. This is true whether a case involves appointment of defense lawyer to defend an indigent accused, or an attorney appointed to act as prosecutor *pro tem* in a complex criminal case or a case in which the elected prosecutor is disqualified or simply steps aside.

Moreover, requiring that all appointed attorneys work for basically the same compensation would amount to nothing more than an act of judicial legislation. Those delegated the legislative responsibility for the creation of Collin County plan have deemed it "manifestly inappropriate" to apply the ordinary fee schedule to

cases such as the instant one.[12] The Fifth Court of Appeals has substituted its judgment and suggested this is what must occur.

If the relevant provision is void, then it should be excised from the plan. In its absence, compensation should be ordered under the voided category of cases the same as it would if Collin County had adopted no compensation plan at all. There being a constitutional duty of the courts to secure counsel in all cases but no plan in place for a limited category of cases, it would be incumbent on the courts, individually, to order compensation they deem necessary and appropriate (see discussion in Section I above). This would remain the case until Collin County District Judges voluntarily amended their plan or were ordered to do so through a more appropriately targeted writ of mandamus.

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[12] This is not conclusory. The attorneys prosecuting Kenneth Paxton would be paid $1000 each if Mr. Paxton decided to plead guilty. Assuming a modest 20 days in trial the same attorneys combined would be paid $42,000 -- less than 9% earned by the special prosecutors in pre-trial matters alone at a reasonable rate. See the Commissioner's brief at the court below, page 8.

III

**Courts of Last Resort in Sister States Have Determined That the Judiciary Has the Inherent Authority to Pay Attorneys Fees Which Differ from Previously Created Statutory Fee Schedules in Unusual Circumstances or Where the Fee Would Be Manifestly Inappropriate Because of Circumstances Beyond the Control of the Appointed Counsel.**

Circumstances similar to those at bar have arisen in sister States. The resolution of these conflicts by the courts of last resort in those states reflects the path Texas should take.

The State of Florida was faced with a similar problem more than thirty years ago. In ***Makemson v. Martin County***, 491 So. 2d 1109 (Fla. 1986), a trial court was faced with a situation in which its proposed compensation to court appointed counsel was $4,500, when the sum of $2,000 was the maximum allowed under the applicable Florida statute. ***Makemson***, 491 So. 2d at 1111. The trial court expressed the dilemma it faced:

> [T]his court is confronted with conflicting laws, one of which requires competent counsel for a defendant who has been sentenced to death and the other stating that defense counsel can be paid only $2,000 for his services. The lowest bid for these services was $4,500, which is more than twice what the Legislature has allowed. One of these laws must yield to the other. There is no doubt in the court's mind that the Legislature, if confronted with the problem, would admit that the law

> requiring competent counsel was paramount and superior to the law allowing a mere $2,000 fee for the dreadful responsibility involved in trying to save a man from electrocution. Therefore this court finds that F.S. 925.036 in setting rigid maximum fees without regard to the circumstances in each case is arbitrary and capricious and violates the due process clause of the United States and Florida Constitutions. See Aldana v. Holub, 381 So.2d 231 (Fla. 1980). In simpler language, the Statute is impractical and won't work.

***Makemson***, 491 So. 2d at 1111. The trial court ordered the greater compensation and the State appealed. The Fourth District quashed the trial court's order declaring unconstitutional section 925.036, Florida Statutes (1981), and allowing petitioners to be compensated for their representation of an indigent criminal defendant in amounts exceeding the statutory maximum fees. ***Makemson***, 491 So. 2d at 1110. The Florida Supreme Court noted that:

> We simply cannot on the one hand instruct the bench and bar, as we did in Wilson v. Wainwright, 474 So.2d 1162, 1165 (Fla. 1985), that "[a] perfunctory appointment of counsel without consideration of counsel's ability to fully, fairly and zealously advocate the defendant's cause is a denial of meaningful representation which will not be tolerated," and at the same time deny the courts the ability to exceed the fee limits when necessary to do justice.

***Makemson***, 491 So. 2d at 1114. Ultimately, the Florida Supreme Court held:

> it is within in the inherent power of Florida's trial courts to allow, in extraordinary and unusual cases, departure from the statute's fee

> guidelines when necessary in order to ensure that an attorney who has served the public by defending the accused is not compensated in an amount which is confiscatory of his or her time, energy and talents. More precise delineation, we believe, is not necessary. Trial and appellate judges, well aware of the complexity of a given case and the attorney's effectiveness therein, know best those instances in which justice requires departure from the statutory guidelines.

***Makemson***, 491 So. 2d at 1115. In reaching its conclusion that a trial court had this "inherent" power, the Court considered and relied upon the Sixth Amendment to the Constitution of the United States. ***Makemson***, 491 So. 2d at 1115. Although ***Makemson*** is clearly not controlling, TCDLA suggests that its rationale and reliance on the Sixth Amendment is sound.

The Florida Supreme Court is not alone in its determination that the judiciary has the inherent power ignore statutory caps in extraordinary and unusual cases. In ***State v. Young***, 172 P.3d 138 (NM 2007), the New Mexico Supreme Court found that it had the "inherent authority to ensure that indigent defendants receive constitutionally adequate assistance of counsel." ***Young***, 172 P.3d at 143. The New Mexico case used such inherent power to set a specific hourly rate which counsel was to be paid in that case. ***Young***, 172 P.3d at 144. TCDLA suggests that the same inherent

power exists in Texas' trial courts, when the facts, circumstances and complexity of a particular case require a fee which exceeds a preestablished schedule of compensation.

Five years after the Supreme Court of Florida found its mandatory cap unconstitutional in ***Makemson***, the Supreme Court of Arkansas was faced with a similar situation. In ***Arnold v. Kemp***, 813 SW 2d 770 (Ark. 1991), criminal defense lawyers ("Messers Arnold and Allen) were appointed to represent a woman who had been accused of murdering her husband and had been charged with capital murder. Although they objected to the appointment, they represented their client during her arraignment, and trial date was set for April 1, 1991.

On March 14, 1991, Messrs. Arnold and Allen advised the trial court that they were refusing to proceed because they could not provide their client with effective assistance of counsel, as they were reluctant to incur overhead expenses while representing her, particularly in light of the fact that the trial court had refused to reimburse them for their out-of-pocket expenses or provide

attorney's fees and had refused to supply their client with funds with which to hire the necessary expert and investigatory assistance. Counsel were found to be in contempt of court, fined $1,000.00, and ordered to appear before the court on March 29, 1991, for further proceedings. ***Arnold***, 813 SW2d at 771.

At that time, section 16-92-108 of the Arkansas Code placed a $1,000 "cap" on the expenses and fees paid to court appointed counsel. ***Arnold***, 813 SW2d at 776. The Court held that:

> even though section 16-92-108 establishes a fee cap of $1,000.00 in the defense of a capital murder charge, the General Assembly declared that:
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> > (a) Whenever legal counsel is appointed by any court of this state to represent indigent persons accused of crimes, whether misdemeanors or felonies, the court shall determine the amount of the fee to be paid the attorney and an amount for a reasonable and adequate investigation of the charges made against the indigent and shall issue an order for the payment thereof.
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> > * * * * * *
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> > (b)(3) The attorney's fees provided for by this section shall be based upon the experience of the attorney and the time and effort devoted by him in the preparation and trial of the indigent, commensurate with fees paid other attorneys in the community for similar services."

***Arnold***, 813 SW2d at 776. Faced with these conflicting legislative statements, the Arkansas Court held that:

> the statutory limitation of expenses, in the sum of $100.00, does not provide the necessary funds for Jernigan's defense, and, here again, it would constitute a taking to force Messrs. Arnold and Allen to finance these expenses out of their own pockets in order to provide her effective assistance of counsel.

***Arnold***, 813 SW2d at 777. Although the facts and limitations involved the ***Arnold*** case are extreme, they demonstrate the types of problems which can occur when boards of governance, rather than an independent judicial officer, are permitted to establish the fees to be paid to lawyers appointed by a trial court to perform a specific task by a trial court.

## Conclusion

Ultimately, the question to be decided in the instant case is whether the judiciary will decide on compensation in a particular criminal case, or that decision is to be made based solely on the desires of the local commissioners court. TCDLA suggests that, should the opinion of the Court of Appeals at issue be permitted to stand, all of the gains made and all of the advances and improvements accomplished in indigent defense in Texas over the last 20 years will fall to the wayside. Texas will return to the days

of sleeping lawyers and otherwise unemployed insurance lawyers taking court appointments in criminal cases until they can find other employment.

The Court of Appeals' opinion will have the same negative impact on the appointment of a prosecutor *pro tem* or "special prosecutor."[13] Moreover, recent developments militate towards complete rejection of the Court of Appeals' holding in this case.

The "shootout" in Waco occurred nearly 2½ years ago, yet the first trial has only recently got underway.[14] One hundred fifty-three cases remain pending.

Yesterday, the elected District Attorney of McLennan County asked to be recused from all further prosecutions in those cases.[15] In order to prevent an unacceptable delay in prosecution of the remain 153 cases, a prosecutor *pro tem* or team of special

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[13] The terms are interchangeable. An attorney *pro tem* or special prosecutor takes the place of the disqualified district attorney assuming all the district attorney's powers and duties in the case. ***State v. Rosenbaum***, 852 S.W.2d 525 (Tex.Cr.App. 1993).

[14] See footnote 4, *supra*.

[15] See "***DA Reyna Asks to Be Recused from 2nd Twin Peaks Trial***;" Waco Tribune; October 26, 2017.

prosecutors will have to be assembled promptly, and that lawyer or lawyers will have to have sufficient staff to efficiently review and process all the remaining cases. There can be no doubt but that the Court of Appeals' opinion at issue will make that job all but impossible.

TCDLA members remember the days before the enactment of the Fair Defense Act. None of TCDLA's members want to return to those days and the lack of quality indigent defense that was endemic in that period.

The separation of powers established by the Texas Constitution provided the Judiciary with the exclusive authority and responsibility to secure counsel for indigent defendants and to determine who those lawyers will be compensated. Moreover, any statute purporting to require the judiciary to compensate all appointed lawyers at the same rate would violate the Judiciary's integrity and independence, as well as the Sixth Amendment. When a trial court enters an order to compensate a court appointed lawyer in a criminal case, the local commissioners court

may not use the separation of powers doctrine to avoid compliance with that Order.

## Prayer

WHEREFORE, PREMISES CONSIDERED, the Texas Criminal Defense Lawyers Association, *amicus curiae* in the above styled and numbered cause respectfully prays that, for the reasons set out herein, the Court will grant Relator's claim for mandamus relief, and will vacate the opinion and judgment of the Court below.

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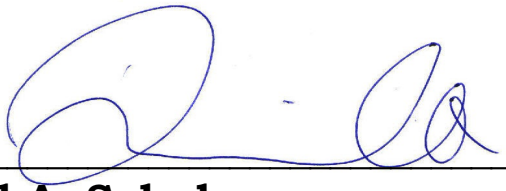

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