

NO. 00000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 198th JUDICIAL DISTRICT
JOE SMITH) BANDERA COUNTY, TEXAS

**DEFENDANT'S FIRST MOTION TO SET ASIDE THE INDICTMENT
[Separation of Powers]**

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves to set aside his indictment because prosecution by the Attorney General of Texas violates the Separation of Powers provision of Article II, §1 of the Texas Constitution.

**I.
The Attorney General
– Not The District Attorneys Of Medina Or Bandera Counties –
Is Directing This Prosecution**

The opening paragraph of this indictment, which was returned by a Grand Jury in Bandera County, Texas, refers generally to events occurring between January 23, 2018 and March 2, 2018, “in the County and State aforesaid.” Each of the following 35 counts purport to charge crimes that occurred “in Medina County, Texas, a county adjoining Bandera County, Texas.” But the District Attorneys of those two counties have had little or nothing to do with this prosecution. The Texas Attorney General is directing the prosecution of Joe Smith, and has done so from the very beginning.

The case was referred to Attorney General’s Office on March 23, 2018 by the Texas Secretary of State Director of Elections Office, and the investigation of the case

has been controlled by the Attorney General since that time. The lead investigator in the case is a Sergeant in the Attorney General’s Office, and the prosecutors are attorneys employed by the same office. The prosecuting agency named on the indictment is “Office of the Attorney General.”

II. A Constitutional Bulwark Against The Accumulation Of Excessive Power In A Single Branch Of Government

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: 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.

TEX. CONST. Art. II, § 1.

“This separation of powers provision reflects a belief on the part of those who drafted and adopted our state constitution that one of the greatest threats to liberty is the accumulation of excessive power in a single branch of government. The provision also has the incidental effect of promoting effective government by assigning functions to the branches that are best suited to discharge them.” *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990). “The separation of powers doctrine therefore requires that ‘any attempt by one department of government to interfere with the powers of another is null and void.’” *Meshell v. State*, 739 S.W.2d 246, 252 (Tex. Crim. App. 1987).

A. Our Constitution has assigned the District Attorney to the judicial branch,

and the Attorney General to the executive branch.

The offices of county and district attorney are in the judicial branch of government. TEX. CONST. Art. V § 21; *See Saldano v. State*, 70 S.W.3d 873, 876 (Tex. Crim. App. 2002). The Attorney General, on the other hand, is in the executive branch. TEX. CONST. Art. IV, § 1; *Saldano v. State*, 70 S.W.3d at 879. The Texas Constitution is clear: “The duty of criminal prosecution in the trial courts of record is on the county attorney and the district attorney (or criminal district attorney).” *Saldano v. State*, 70 S.W. 3d at 876.

B. Allowing the Attorney General to direct this prosecution violates Article II, § 1.

Presumably, the Attorney General will claim that § 273.021(a) of the Texas Election Code authorizes him to prosecute this indictment. It is axiomatic, though, that legislative acts that violate the Texas Constitution, including the separation of powers doctrine provided by Article II, § 1, are null and void. In *Armadillo Bail Bonds*, the Texas Court of Criminal Appeals held article 22.16(c)(2) of the Code of Criminal Procedure violative of the separation of powers doctrine and invalid because this legislative act “unduly interferes with the Judiciary's effective exercise of its constitutionally assigned power.” In *Meshell*, the Court struck down Texas’s statutory Speedy Trial Act, finding no “constitutional provision expressly granting the Legislature the power to control a prosecutor's preparation for trial.” 739 S.W. 2d 246, 257. The same reasoning compels the conclusion that §273.021(a) is unconstitutional under Article

II, § 1 of the Texas Constitution. This statute is an attempt by the legislature to interfere with the powers of the judicial branch and is therefore null and void. *See Meshell v. State*, 739 S.W.2d at 252.

In *Stephens v. State*, the defendant, the elected Sheriff of Jefferson County, asserted that Texas's separation of powers doctrine prevented the Attorney General from prosecuting her in District Court for violating the Election Code and the Penal Code. 608 S.W.3d 245, 249 (Tex. App.–Houston [1st Dist.] 2020, pet. granted). Specifically, she said that § 273.021(a) violated the separation of powers clause by delegating to the executive branch, a duty properly belonging to the judicial branch. The trial court denied Stephens's Motion To Quash, and her Pretrial Application For Writ Of Habeas Corpus. The Court of Appeals affirmed, holding that "Section 273.021(a) of the Election Code clearly and unambiguously gives the Attorney General power to prosecute criminal laws prescribed by election laws generally, whether those laws are inside or outside of the Code." *Id.* at 251.

The Texas Court of Criminal Appeals granted Stephens's petition for discretionary review to decide several questions, including: "Whether, if the Attorney General has the authority to prosecute this case under § 273.021, the statute's grant of prosecutorial authority violates the separation of powers requirement in the Texas Constitution." District Attorneys from the counties of Bexar, Dallas, Fort Bend, Harris, Nueces, and Travis, filed an *amicus* brief in support of Sheriff Stephens's constitutional argument. Joe Smith submits that Sheriff Stephens and the *amici* are correct, and we adopt by reference

in this motion the arguments they make in the court of criminal appeals. The separation of powers doctrine of Article II, § 1 of the Texas Constitution prevents the Texas Attorney General from directing this prosecution in this Court. Accordingly, all 35 counts of this indictment must be set aside.

**III.
Prayer**

Joe Smith prays that the Court set aside the indictment in this case for the reasons given in this motion.

Respectfully submitted:

/s/ Mark Stevens

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CERTIFICATE OF SERVICE

I certify that a copy of defendant's Motion has been electronically delivered to assistant Attorneys General on August 3, 2021.

/s Mark Stevens
MARK STEVENS

