NO. _____

IN THE

COURT OF CRIMINAL APPEALS

IN RE THE STATE OF TEXAS EX REL. BRIAN W. WICE, RELATOR.

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

RELATOR'S PETITION FOR WRIT OF MANDAMUS

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THE STATE OF TEXAS

ORAL ARGUMENT REQUESTED

IDENTIFICATION OF THE PARTIES

Relators:
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Kent Schaffer
Nicole DeBorde

Counsel for Relator
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:
Bryan Burg & Clyde Siebman

Real Party in Interest-Defendant
Warren Kenneth Paxton, Jr.

Counsel for Real Party in Interest-Defendant
Dan Cogdell
Bill Mateja
Philip Hilder

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

Honorable Robert Johnson
177th Criminal District Court
Harris County, Texas

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STATEMENT REGARDING ORAL ARGUMENT

This original action presents a critical question impacting defense lawyers, prosecutors, and trial judges in Texas. The court of appeals' resolution of an issue of first impression will have a chilling effect on the ability of trial judges to appoint qualified lawyers – defense attorneys and special prosecutors alike – willing to take on the most complicated and serious cases. Oral argument will significantly aid the Court in resolving this novel and important issue.

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. 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,[1] *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

[1] These cause numbers are three felony indictments filed in the 416th District Court of Collin County. After Judge Gallagher granted the State's motion for change of venue, these cases were transferred to the 177th District Court of Harris County. Relator refers to the "Special Prosecutors," Respondent is "the court of appeals," Real Party in Interest Collin County Commissioners Court are "the Commissioners," and the Defendant-Real Party in Interest is "Paxton."

Fees to Attorneys Pro Tem" approving a second set of interim requests for pre-trial compensation for work performed in these matters in 2016.[2] *In re Collin County, Texas, and County Commissioners*, ___ S.W.3d ___, 2017 WL 3587108 (Tex.App.– Dallas August 21, 2017)(orig. proceed.).

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

A. The Special Prosecutors are Appointed to Investigate Paxton

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.[3] Pursuant to TEX. GOVT. CODE art. 411.0255(b),[4] Collin County District Attorney Greg Willis, a long-time friend and business partner of Paxton, filed a request on April 20, 2015, recusing his office in this investigation.[5] Pursuant to TEX. CODE

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[2] In an order issued September 1, 2017, the court of appeals stayed its original order that Judge Gallagher vacate his order from September 20 to September 27, 2017. In a separate filing today, Relator has also sought a stay of the court of appeals' order.

[3] Patrick Svitek, *Collin DA Asks to Step Aside in Paxton Probe*, www.texastribune.org (April 21, 2015).

[4] "A prosecuting attorney may request that the court with jurisdiction over the complaint permit the attorney to recuse himself or herself for good cause in a case investigated under this sub-chapter, and on submitting the notice of recusal, the attorney is disqualified."

[5] All motions, pleadings, writs, and orders referenced herein may be found on the Harris County District Clerk's website. www.hcdistrictclerk.com/Edocs/Public/search/aspx. The cause numbers in these matters are 1555100, 1555101, and 1555102.

CRIM. PROC. art. 2.07(a), Collin County Local Administrative Judge Scott Becker was empowered to appoint private counsel or a district attorney to serve as attorneys *pro tem*.[6] Judge Becker had a choice of appointing private counsel from Collin County or a district attorney from the region to investigate and possibly prosecute the sitting Attorney General,[7] one of Collin County's most popular and powerful political figures. To avoid these two unacceptable choices, Judge 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.[8] Slip op. 2. TEX. CODE CRIM. PROC. art. 26.05(a) mandates that trial judges must take into account "the experience and ability of the appointed counsel" in their discretion-driven determination of awarding reasonable attorney's fees. The three Special Prosecutors have almost one hundred years worth of

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[6] Art. 2.07(c) mandates that private counsel be compensated in the same manner as defense counsel appointed to represent an indigent person pursuant by the county where the prosecution takes place. A district attorney appointed as a *pro tem* is not entitled to compensation.

[7] Becker was no doubt aware of the intense political pressure that could be brought to bear on private counsel. This Court can take judicial notice that almost all district or county attorneys in Texas have to deal with the Texas Attorney General's Office on a regular basis in matters involving, *inter alia*, post-conviction habeas corpus, extradition, child support, voter fraud, Public Information Act requests, and the like.

[8] A third attorney *pro tem*, Nicole DeBorde, was appointed by Judge Gallagher in September 2015.

combined experience in criminal trial and appellate matters, including prior experience as attorneys *pro tem.*

The Special Prosecutors would be paid in the same manner as appointed defense. When Judge Becker appointed the Special Prosecutors, TEX. CODE CRIM. PROC. art. 26.05(c) required the Collin County District Judges to adopt local rules relating to the compensation of appointed defense counsel in felony cases. Slip op. 2-3. At the time, Local Rule 4.01B provided:

> 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.

Slip op. 3.

B. A Collin County Grand Jury Indicts Paxton on Three Felonies

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.[9] Over the next seven and one-half months, the Special Prosecutors incurred considerable expenses and

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[9] *See* n. 5, *supra.*

engaged in extensive work that included responding to over a dozen pre-trial writs and motions filed by Paxton's 12-member legal team,[10] 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. *Ex parte Paxton*, 493 S.W.3d 292 (Tex.App. – Dallas 2016, pet. ref'd)(en banc).

C. The First of Multiple Challenges to the Special Prosecutors' Fees

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

[10] To pay for his extensive legal team, Paxton established a legal defense fund that has raised over $500,000. Andrea Zelinski, *Paxton grows defense fund*, www.chron.com (July 6, 2017).

$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. Because Paxton never asked Judge Gallagher for findings of fact on the denial of his motion, this Court must assume that he made all implicit fact findings that supported his ruling that he had judicial discretion under Rule 4.01B to deviate from the fee schedule. *State v. Ross*, 32 S.W.3d 853, 855 (Tex.Crim.App. 2000).

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, Paxton's friend and political donor, Jeffory Blackard, sued the Special Prosecutors multiple times "on behalf of the taxpayers of Collin County" parroting the claims made in Paxton's 2015 motion. After the court of appeals dismissed Blackard's last lawsuit, the Commissioners sought mandamus relief in the court of appeals against Judge Gallagher.[11] After calling for a response, the court of appeals granted mandamus relief on August 21, 2017.[12] Paxton's third-degree felony trial is set to begin on December 11, 2017.

STATEMENT OF JURISDICTION

Art. V, § 5 of the Texas Constitution grants this Court power to issue writs of mandamus where the "criminal law matter" involves an order for payment of attorneys fees pursuant to TEX. CODE CRIM. PROC. art. 26.05. *Smith v. Flack*, 728 S.W.2d 784, 788-89 (Tex.Crim.App. 1987).

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[11] Because Collin County does not have a County Attorney's Office or a Civil Division in the District Attorney's Office, it must contract with private counsel whenever it institutes suit or is sued. Counsel for the Commissioners is being compensated at the rate of $375 an hour, more than the Special Prosecutors agreed to. Lauren McGaughy, *Collin County fights to rid itself of costly Ken Paxton lawsuits*, www.dallasnews.com (June 14, 2017).

[12] Slip op. 1. On August 28, 2017, the Commissioners voted 5-0 to authorize counsel to file another writ of mandamus against Judge Gallagher seeking to claw back the $205,000 it voted to pay the Special Prosecutors without objection on January 11, 2016. Lauren McGaughy, *Collin County Commissioners vote to claw back Paxton prosecutors pay*, www.dallasnews.com (August 30, 2017).

GROUND FOR MANDAMUS RELIEF

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.

SUMMARY OF ENTITLEMENT TO RELIEF

The court of appeals clearly abused its discretion granting mandamus relief to the Collin County Commissioners because:

- It failed to employ the exacting standard for obtaining extraordinary relief on a question of first impression.

- The court of appeals resolved a statutory issue without any meaningful statutory interpretation.

- Its invalidation of a local rule based on allegedly internally conflicting statutory language violated the canons of statutory construction and led to absurd results the Legislature could not have intended.

- The court of appeals violated the separation of powers doctrine because the statutes at issue dictate how trial judges control payment of reasonable attorney's fees to both attorneys *pro tem* and defense counsel alike.

- Additionally, the court of appeals failed to recognize that the Commissioners' request was barred by laches, a defense premised on principles of equity that this Court has held figure prominently in its decision whether to grant extraordinary relief. The Commissioners' 18-month delay in seeking mandamus relief was unreasonable because they knew in December, 2015, the attorneys *pro tem* had been paid under the contested fee schedule, and they were the only entity with standing to challenge the order. This

unreasonable delay prejudiced the Special Prosecutors, who have not been paid in the past 18 months, yet have continued to work in good faith, and now face a potential lawsuit to claw back their attorney's fees which the Commissioners agreed to pay without objection.

ARGUMENT AND AUTHORITIES

I. Trial Court Discretion is Essential To the Administration of Justice

> The legislative branch of this state has the duty to provide the judiciary with the funds necessary for the judicial branch to function adequately. If this were not so, a legislative body could destroy the judiciary by refusing to adequately fund the courts. *The judiciary must have the authority to prevent any interference with or impairment of the administration of justice in this state.*
>
> *Vondy v. Commissioners Court of Uvalde Cty.*,
> 620 S.W.2d 104, 110 (Tex. 1981)(emphasis added).

One of the most serious threats to fundamentally fair trials with accurate results is the lack of adequate compensation for appointed counsel. *See e.g., Martinez-Macias v. Collins*, 979 F.2d 1067, 1067 (5th Cir. 1992)("We are left with the firm conviction that Macias was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question. The state paid defense counsel $ 11.84 per hour. Unfortunately, the justice system got only what it paid for."). As the Supreme Court noted in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), "There are few defendants charged with crime, few indeed, who fail to hire

the best lawyers they can to prepare and present their defenses." The responsibility of ensuring that counsel is fairly compensated and the defendant fairly represented rests with the trial judge. The Supreme Court and this Court have consistently held that not only are indigent defendants entitled to adequate funding for effective assistance of counsel, but to adequate funding for experts essential to presenting a meaningful defense.[13]

This original action presents a critical question of first impression that is just as important as the adequate funding of appointed defense counsel: whether a trial judge has inherent discretion to award reasonable attorneys fees to attorneys *pro tem.* In other words, is the State also entitled to the same adequate funding as indigent defendants.

The inherent judicial discretion vested in trial court judges is the lifeblood of the criminal justice system. Because trial judges are called

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[13] *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)(indigent defendant entitled to funding for expert psychiatric testimony where sanity at the time of the offense is significant issue); *Williams v. State*, 958 S.W.2d 186, 191 (Tex.Crim.App. 1997)(*Ake* "is premised upon the notion that an indigent is entitled to 'meaningful access to justice' which means that he should have 'access to the raw materials integral to the building of an effective defense' thus ensuring 'a proper functioning of the adversarial process'"); *De Freece v. State*, 848 S.W.2d 150, 159 (Tex.Crim.App. 1993)(following *Ake*); *see also McWilliams v. Dunn,* 137 S.Ct. 1790, 1801 (2017)(granting federal habeas relief to state prisoner based on denial of right to appointed expert psychiatrist under *Ake*)

upon on a daily basis to make judgment calls in real time, their rulings must be entitled to tremendous deference. Well-settled authority from this Court fortifies this fundamental tenet:

- Appellate review of a trial judge's decision is ordinarily limited to whether the trial judge's ruling was an abuse of discretion.[14]
- A trial judge's ruling is not an abuse of discretion unless it is arbitrary, unreasonable, or outside the zone of reasonable disagreement.[15]
- The trial court does not abuse its discretion merely because an appellate court would have decided an issue in a different manner.[16]
- The trial court's ruling will be upheld if it is correct on any theory of law applicable to the case.[17]

This exceedingly deferential standard of review is particularly important when it comes to the trial court's discretionary authority to determine fair and reasonable attorney's fees pursuant to TEX. CODE CRIM. PROC. art. 26.05(a), a fundamental tenet recognized by the court of appeals and this Court. *See, e.g., In re Perkins*, 512 S.W.3d 424, 432

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[14] *Crain v. State,* 315 S.W.3d 43, 48 (Tex.Crim.App. 2010).

[15] *State v. Mechler*, 153 S.W.3d 435, 439 (Tex.Crim.App. 2005).

[16] *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985)

[17] *State v. Story*, 445 S.W.23d 729, 732 (Tex.Crim.App. 2014).

(Tex.App.– Corpus Christi 2016)("Further, article 26.05 recognizes the application of judicial discretion to an award of attorney's fees because it provides for a 'reasonable attorney's fee' that is 'based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel.'"). While this Court denied leave to file relator's petition for writ of mandamus in *Perkins*, Judge Johnson, joined by Judge Richardson and Judge Newell, concluded, "By the plain language of Art. 26.05(c), the determination of an appropriate payment is at the discretion of the judge." *In re Perkins*, 502 S.W.3d 816, 816-17 (Tex.Crim.App. 2017)(Johnson, J., joined by Richardson & Newell, JJ., *concurring*). While the court of appeals cited *Perkins*, slip op. 8, it did so on an issue unrelated to its holding, and made no mention of the keenly-discretionary nature of a trial judge's decision to award reasonable attorney's fees pursuant to art. 26.05(a).

These sentiments have been echoed by a federal appellate court:

> *Perhaps the most common category of decisions committed to the discretion of the trial court encompasses those situations where the decision depends on first-hand observation or direct contact with the litigation.* ... Only the trial judge has supervised the course of the litigation through discovery and pretrial, and can observe the diligence or procrastination of the attorneys. *In those circumstances the trial court has a*

> *superior vantage point which an appellate court cannot replicate. The trial court's decision therefore merits a high degree of insulation from appellate review.*[18]

Because one-size-fits-all has no application in the administration of justice, especially in the discretionary-laden act of determining reasonable attorney's fees, the Collin County Board of Judges adopted Local Rule 4.01B. This presumptively-valid rule, slip op. 5, mandates 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.

This provision incorporates the collective belief of the Collin County criminal judges based on their experience and expertise[19] about what attorney's fees are reasonable. It also recognized that because all criminal cases are not alike, trial judges must be afforded the discretion to deviate from the fee schedule because, while most fall within the range covered by the rates set out in the fee schedule, other cases are extraordinary. Rule 4.01B is a well-accepted practice in Texas. The language in Rule 4.01B

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[18] *United States v. Criden*, 648 F.2d 814, 817-18 (3rd Cir. 1981)(emphasis added).

[19] *See In re Perkins*, 512 S.W.3d at 432 ("The trial court is generally in the best position to determine the appropriate fees to award appointed attorneys for their work on a case.").

affording trial judges discretion to deviate from fee schedules appears in some form in 168 of the 254 counties in Texas, 66 percent, two-thirds of all Texas counties.[20]

This case presents an issue of first impression whose importance to defense attorneys, prosecutors, and trial judges throughout Texas cannot be overstated. It falls at the intersection of two equally-important precepts that form the backbone of the criminal justice system: (1) the payment of reasonable fees to appointed counsel, and (2) the trial court's discretionary power to ensure this mandate is met. Because no appellate court can replicate the superior vantage point from which a trial judge sits, the latter's discretionary rulings are entitled to a substantial degree of insulation from appellate review, free from being "second-guessed."

That is *precisely* what happened here.

The court of appeals held that the presumed validity of Rule 4.01B and plain language of art. 26.05(a) was trumped by arts. 26.05(b) & (c), without engaging in any meaningful statutory interpretation of either art. 26.05(a) or Rule 4.01B. Similarly, the court of appeals failed to consider

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[20] These figures are contained in a recent study conducted by the Texas Commission on Indigent Defense, available at www.tidc.texas.gov/media/57807/judicial-discretion-plan-review.pdf, and attached as an appendix.

whether its uncritical acceptance of the plain language of arts. 26.05(b) & (c) to conclude that it trumped Rule 4.01B, its failure to read these precepts in harmony with art. 26.05(a), and Rule 4.01B, would lead to absurd results the Legislature could not have possibly intended. *See e.g., Yazdchi v. State*, 428 S.W.3d 838-39 (Tex.Crim.App. 2014).

Left unchecked, the court of appeals' decision divesting trial judges of the discretion to control their dockets will have a chilling effect on their ability to appoint competent advocates willing to take on the most complex criminal cases. Its decision will also have a chilling effect on trial judges across Texas, inhibiting their ability to appoint competent attorneys *pro tem* willing to take on the most complex, prosecutions against public officials on shoe-string budgets. These concerns have been expressed by academics and advocates in the wake of the court of appeals' decision,[21] as

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[21] *See* Jess Krochtengel, *Pay Defeat for Paxton Prosecutors Puts Texas Judges in Bind*, www.law360.com (August 29, 2017) "Texas judges may face steep challenges in finding qualified attorneys to serve as special prosecutors in high-profile cases after a state appellate court voided a $300 hourly fee agreement for the lawyers appointed to investigate securities fraud allegations against Texas Attorney General Ken Paxton, experts say. ... 'It does create a dilemma,'" said Mark Jones, a political science professor at Rice University. 'If a DA recuses themself, it limits the options for judges to bring in a special prosecutor. The judges are going to have a very difficult time getting someone to come in for fees far below their hourly rates.' Jones said the cap on fees will make it harder to get high-quality prosecutors, and that the biggest effect of the decision will be reducing the quality of the overall prosecution. 'It shifts the advantage substantially to the defendant,' Jones said. "'Assuming they have resources, the more they can drag out the process, the lower the de facto rate for the prosecutors.'... Edward Mallett, former president of the Texas

well as by the court of appeals[22] and members of this Court.[23]

This Court has made it clear that all courts "have an independent interest in ensuring ... that legal proceedings appear fair to all who observe them." *Bowen v. Carnes*, 343 S.W.3d 805, 816 (Tex.Crim.App. 2011). If this independent interest is to remain inviolate, this Court should hold that the court of appeals decision is a clear abuse of discretion that entitles the Special Prosecutors to mandamus relief.

II. The Court of Appeals Failed to Employ this Court's Deliberately Demanding Standard of Review for Obtaining Mandamus Relief

A. The Critical Role the Standard of Review Plays in this Proceeding

The requirement that court of appeals fully, fairly, and faithfully

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Criminal Defense Lawyers Association, said. 'The prosecutors assigned to prosecute him have been dealt a crippling blow.' Cal Jillson, a political science professor at Southern Methodist University, said the fee schedules are intended for run-of-the-mill criminal cases, not particularly complex or high-profile cases in which senior figures like the state's sitting attorney general are the defendant. 'It does suggest that the system is not effectively set up to deal with the high-profile, complicated cases that do occasionally occur,' Jillson said. 'I think that's particularly the case when you have a high-profile, well-connected individual like the attorney general, who for ideological and political reasons is supported by very wealthy people who can take upon themselves the goal of supporting him and disrupting the trial.'" This article is attached as an appendix.

[22] *In re Perkins*, 512 S.W.3d at 432 ("The trial court's award of 'reasonable' fees in accordance with the fee schedule should not provide an economic disincentive for counsel to receive appointments or to discourage competent attorneys from agreeing to a court appointment, thereby diminishing the pool of experienced, talented attorneys available to the trial court for appointment.").

[23] *In re Perkins*, 502 S.W.3d at 821 (Alcala, J., joined by Meyers, J., *dissenting*)("This case is important because the refusal to pay competent counsel in death-penalty cases will result in only incompetent counsel agreeing to take on these exceedingly complex cases.").

apply the correct standard of review is fundamental to the orderly administration of the appellate process.[24] This principle has been described by legal commentators as:

- "the essential language of appeals"[25]
- "the keystone to court of appeals decision-making"[26]
- "the appellate court's measuring stick"[27]
- "exist[ing] so that the legal process may work fairly and efficiently"[28]

This Court has echoed these sentiments in consistently holding that the ultimate red flag that an appellate court's ruling is suspect is its use of an erroneous, incomplete or misleading standard of review. *See, e.g., Lancon v. State*, 253 S.W.3d 699, 707 (Tex.Crim.App. 2008)(court of appeals' use of incorrect standard of review compelled reversal); *Loserth*

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[24] *See generally*, Robert L. Byer, *Judge Aldisert's Contribution to Appellate Methodology: Emphasizing and Defining Standards of Review*, 48 PITT. L. REV. XVI (1987)(asserting that when appellate judges manipulate the standard of review's scope, or ignore its underlying purpose, an inconsistent and unreliable body of law results).

[25] Steven Alan Childress & Martha S. Davis, FEDERAL STANDARDS OF REVIEW ix (3d ed. 1999).

[26] Michael D. Murray & Christy H. DeSanctis, LEGAL RESEARCH AND WRITING 493 (2005).

[27] W. Wendell Hall, *Standards of Review in Texas*, 34 ST. MARY'S L.J. 1, 8 (2003).

[28] Michael R. Bosse, *Standards of Review: The Meaning of Words*, 49 ME. L. REV. 367, 397 (1997).

v. State, 963 S.W.2d 770, 774 (Tex.Crim.App. 1998)(same); *see also Johnson v. State*, PD-0197-17 (submitted August 16, 2017)(granting discretionary review to determine whether court of appeals applied incorrect standard of review in entering appellate acquittal).

B. The Relator's Heavy Burden in Obtaining Mandamus Relief

"[M]andamus is a drastic remedy, to be invoked only in extraordinary situations." *State ex rel. Sutton v. Bage*, 822 S.W.2d 55, 57 (Tex.Crim.App. 1992). "As the name implies, extraordinary writs issue only in situations involving manifest and urgent necessity," *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989), and they allow courts to "correct blatant injustice that otherwise would elude review by the appellate courts." *In re Reece*, 341 S.W.3d 360, 374 (Tex. 2011). And, unlike civil appellate practice, interlocutory appeals in criminal cases are generally disfavored. *See e.g., Ex parte Perry*, 483 S.W.3d 884, 895 (Tex.Crim.App. 2016). Moreover, extraordinary actions such as mandamus short-circuit the orderly process to which the parties are entitled by which contested questions of law and fact are resolved. *See Knowles v. Scofield*, 598 S.W.2d 854, 860 (Tex.Crim.App. 1980). A relator is entitled to relief in case of first impression only if the principle of law he relies upon is

"positively commanded and so plainly prescribed under the law as to be free from doubt." *In re Allen*, 462 S.W.3d 47, 50 (Tex.Crim.App. 2015).

A court of appeals abuses its discretion in granting a writ of mandamus if the relator fails to demonstrate that: (1) he has no adequate remedy at law; and (2) under the relevant law and facts, what he seeks to compel is a purely ministerial act. *State ex rel. Hill v. Court of Appeals for the Fifth District*, 34 S.W.3d 924, 927 (Tex.Crim.App. 2001). While deferential, this standard is not without limits. *Montgomery v. State,* 810 S.W.2d 372, 392 (Tex.Crim.App. 1991)(op. on reh'g). "'Abuse of discretion' is a phrase which sounds worse than it is. The term does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the [court]." *United States v. Walker*, 772 F.2d 1172, 1176 n. 9 (5th Cir. 1985).

While a remedy at law may technically exist, it "may nevertheless be so uncertain, tedious, burdensome, slow, inconvenient, inappropriate, or ineffective as to be deemed inadequate." *Bowen v. Carnes*, 343 S.W.3d at 805. Because the Special Prosecutors have no adequate remedy at law, they have met this requirement. *State ex rel. Rosenthal v. Poe*, 98 S.W.3d 194, 203 (Tex.Crim.App. 2003)(State had no adequate remedy at law when it "had no right to appeal respondent's order").

The ministerial act requirement is satisfied only if a relator can show a "clear right to the relief sought," meaning that "the merits of the relief sought are beyond dispute." *In re McCann*, 422 S.W.3d 701, 704 (Tex.Crim.App. 2013). Such a showing is possible only when the facts and circumstances dictate one rational decision "under unequivocal, well-settled (*i.e.*, from extant statutory, constitutional, or case law sources), and clearly controlling legal principles." *In re State ex rel. Weeks*, 391 S.W.3d 117, 122 (Tex.Crim.App. 2013); *see also In re Medina*, 475 S.W.3d 291, 299 (Tex.Crim.App. 2015)(mandamus relief unavailable where "the law is at least unsettled"). A ministerial act is not implicated if the trial court must weigh conflicting claims or collateral matters that require legal resolution. *State of Texas ex rel. Hill v. Court of Appeals for the Fifth District*, 34 S.W.3d at 927. *See also Knowles v. Scofield*, 598 S.W.2d at 860 (mandamus will issue only "to require the execution of a matter whose merit is beyond dispute, and may not be employed as scales in which to balance the weight of the evidence or to bridge the gap between broken and disconnected facts."). This Court uses the "clear abuse of discretion" standard to review mandamus actions of the courts of appeals. *Dickens v. Court of Appeals for Second Supreme Judicial Dist. of Texas*, 727 S.W.2d

542, 550 (Tex.Crim.App. 1987).

C. This Court's Deliberately Demanding Standard of Review For Mandamus Proceedings Involving Questions of First Impression

The court of appeals recognized that the issue of whether the district judges exceeded the authority delegated to them under art. 26.05 by adopting Rule 4.01B is a question of first impression. Slip op. 10. "[A]n issue of first impression *can sometimes qualify* for mandamus relief when the factual scenario has never been precisely addressed but the principle of law has been clearly established." *In re State ex rel. Weeks*, 391 S.W.3d at 126 (emphasis added). This Court has stressed that for this "first impression" exception to apply, "the combined weight of our precedents [must] clearly establish" the proposition advanced by the relator. *Id.* at 126. It has also made it clear that "a mandamus proceeding is not the appropriate place to interpret statutory language, clarify this Court's precedent, or create law where there is none." *In re Allen*, 462 S.W.3d at 53.

This authority properly describes the Commissioners' burden in obtaining extraordinary relief as "exacting," "demanding," "formidable," or "onerous." But, as demonstrated below, the court of appeals' resolution

of this question of first impression is suspect because of the employment of an incomplete, misleading standard of review.

D. The Court of Appeals' Reliance on Smith and Holloway is a Non Sequitur

The court of appeals' decision failed to follow these cases. Instead, it relied solely on *Smith v. Flack* and *Holloway v. Fifth Court of Appeals*. Slip op. 9. The court of appeals' selective use of only two sentences from *Smith* fails to adequately reflect the taxing standard of review articulated in that decision. "Mandamus is intended to be an extraordinary remedy, available only in limited circumstances. Typically, mandamus relief is appropriate only where the trial court has failed to perform a ministerial act and a party has no adequate remedy by appeal." Slip op. 9, citing *Smith* v. *Flack*, 728 S.W.2d at 792. *Smith* says nothing about questions of first impression, the most critical factor in this case.

Moreover, this Court decided *Smith* 30 years ago, and the court of appeals overlooks more recent precedent. In light of this Court's decisions in cases like *Weeks*, *McCann*, *Medina*, and *Allen*, the boilerplate standard of review in *Smith* is inadequate to resolve this case. *Holloway* is even less helpful. It is almost as old as *Smith* and dealt with a narrower issue not

present here.[29] Its precedential value is extremely limited.

E. There's More to Medina and Allen than the Court of Appeals Says

When the court of appeals mentions two newer cases – *Medina* and *Allen* – it does so in a cursory manner. The court of appeals recognized the Special Prosecutors' reliance on *Allen* for the proposition that Judge Gallagher's "action could not have been an abuse of discretion where there was no existing authority declaring rule 4.01B invalid." Slip op. 10. It also cited *Medina* for the tenet that "mandamus relief may not be appropriate if the law surrounding a court's action is unclear" in an issue of first impression. *Id.* But this Court had much more to say in *Allen* and *Medina* about the deliberately demanding standard of review in play in extraordinary matters.

First, the court of appeals failed to recognize that this Court *denied* mandamus relief in both cases[30] holding that, as in this case, there was no controlling authority, statutory or decisional, that clearly compelled the

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[29] "The principle issue here then is whether an appellate court, which does not rule on the merits of an appeal but instead dismisses it, can issue a writ of prohibition to protect the judgment which was the subject of the prior appeal." *Holloway v. Fifth Court of Appeals,* 767 S.W.2d at 682.

[30] Ironically, in *Allen*, this Court concluded that the Fifth Court of Appeals clearly abused its discretion in granting mandamus relief against the trial judge on a legal canvas far stronger than the one in this case.

relief sought. *In re Allen*, 462 S.W.3d at 50-52; *In re Medina*, 475 S.W.3d at 305-08. Second, and more importantly, what *Allen* said about statutory construction, exposes why its absence in the court of appeals' decision is so problematic:

- "A mandamus proceeding is not the appropriate place to interpret statutory language,[31] clarify this Court's precedent, or create law where there is none."[32]

- "If the law surrounding a court's action is unclear, mandamus relief may not issue despite how unwise we think the action may have been. At times, it is an exercise in judicial restraint."[33]

- "Public-policy arguments quickly pile up on both sides of the debate ... several have been presented to this Court. But they find utility only in the Legislature and should be directed there."[34]

The court of appeals' brief reference to *Medina*, slip op. 10, fares no better, ignoring this Court's well-settled body of authority:

- "Equitable principles are necessarily involved when we consider whether mandamus ... should issue."[35]

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[31] Tellingly, as set out at pp. 28-39, *infra*, the court of appeals attempt "to interpret statutory language" was one devoid of any reference to, or reliance on, the canons of statutory construction.

[32] *In re Allen*, 462 S.W.3d at 53.

[33] *Id.* at 52-53.

[34] *Id.* at 53.

[35] *In re Medina*, 475 S.W.3d at 297-98. As set out at pp. 48-50, *infra*, the court of appeals' failure to see that laches precluded its granting of relief was a clear abuse of discretion.

- "If the trial court was merely asked to decide a novel issue of unsettled law, [mandamus] is inappropriate."[36]

- "[T]he standard for the extraordinary relief of [mandamus] is not one of mere persuasion..."[37]

- We expect trial court judges to make difficult legal decisions on novel legal arguments like this one all the time. That we might disagree with the result does not make the trial court's decision a ministerial one.[38]

This reasoning and analysis demonstrates the court of appeals clearly abused its discretion in granting mandamus relief against Judge Gallagher's payment order based on Rule 4.01B.

F. The Court of Appeals Abused its Discretion Holding that Mandamus Relief in This Case Of First Impression is "Positively Commanded and So Plainly Prescribed" by Smith v. Flack "As to Be Free From Doubt"

There is a final reason the court of appeals' decision cannot withstand scrutiny by this Court.

The court of appeals recognized that mandamus relief in this question of first impression was inappropriate unless "the principle of law

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[36] *Id.* at 307.

[37] *Id.* at 305 n. 12.

[38] *Id.* at 307. Unlike the difficult legal decision based on a novel legal theory in *Medina*, Judge Gallagher's decision, one fortified by local rules in almost 70 percent of all Texas counties, was not difficult and, most certainly not based on a novel legal argument.

on which the relator relies is 'positively commanded and so plainly prescribed under the law as to be free from doubt.'" Slip op. 10, citing *In re Medina*, 475 S.W.3d at 298. In an effort to find a case from this Court that met this demanding standard, the court of appeals relied upon *Smith v. Flack* to hold this Court "has previously concluded that granting mandamus relief based on a construction of article 26.05 was appropriate." Slip op. 10. This assertion says too much and too little.

First, the court of appeals' reliance on *Smith* fails to discuss the following facts and circumstances that defined this Court's holding:

- This Court *granted* mandamus relief to four appointed lawyers paid *in excess* of the Harris County fee schedule with the trial judge's approval but whose bills were blocked by county commissioners.[39]
- This Court held that the trial judge's decision to award "reasonable attorneys fees" was a purely discretionary act.[40]
- In holding the award of "reasonable attorneys fees" to be a purely discretionary act, this Court construed art. 26.05 guided by the rules of statutory construction in the Code Construction Act,[41] a critical construct in matters of statutory construction the court of appeals

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[39] *Smith v. Flack*, 728 S.W.2d at 788-92. (emphasis added).

[40] *Id.*

[41] *Id.* at 789.

failed to fully utilize.[42]

- This Court held that it was bound to construe art. 26.05 liberally to attain the objectives intended by the Legislature,[43] which continues to this day, that includes the payment of "reasonable attorneys fees commensurate with the factors in art. 26.05(a).

The court of appeals' decision striking down Rule 4.01B based on *Smith* is unsupportable. Nothing in *Smith* justifies the court of appeals' disregard for more recent precedent setting out the demanding standard in extraordinary matters involving questions of first impression.

Moreover, the court of appeals overlooked the cases where this Court held that mandamus relief was *not appropriate* based on a construction of art. 26.05. *See, e.g., In re Perkins*,[44] 502 S.W.3d at 816; *Peterson v. Jones*, 894 S.W.2d 370, 373 (Tex.Crim.App. 1995); *Curry v. Wilson*, 853 S.W.2d 40, 45 (Tex.Crim.App. 1993); *Gray v. Robinson*, 744 S.W.2d 604, 607-08 (Tex.Crim.App. 1988). That this Court "previously concluded that granting mandamus relief based on a construction of article 26.05 was

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[42] See pp. 28-39, *infra.*

[43] *Id.* at 789.

[44] In *Perkins*, leave to file petition for writ of mandamus was denied to review the court of appeals denial of mandamus relief claiming the trial judge had a ministerial duty to pay second-chair defense counsel his full fee in a death penalty case. *In re Perkins*, 512 S.W.3d at 432.

appropriate," slip op. 10, based on *Smith* does not mean *a fortiori* that *Smith* can support the great weight the court of appeals rests upon it.

The court of appeals' reliance on *Smith* is limited to two sentences and a conclusory claim culled from a head note without any context. This does not rise to the required level of constituting "the combined weight of this Court's precedents clearly establishing the proposition" this Court announced in *Weeks*.[45] The court of appeals clearly abused its discretion by granting mandamus relief for the Commissioners.

III. The Court of Appeals Resolved the Question of First Impression of Whether the Board of Judges Exceeded Their Authority in Enacting Local Rule 4.01B Without Any Meaningful Statutory Interpretation

This extraordinary matter of first impression turns on one thing: statutory interpretation. But the court of appeals failed to engage in any meaningful statutory interpretation. Moreover, precisely because this extraordinary matter required the court of appeals to interpret statutory language, it clearly abused its discretion in granting mandamus relief.

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[45] The clear error of the court of appeals' reliance on *Smith* is further fortified by this Court's deeply-felt belief that the Harris County Commissioners "unauthorized policy" refusing to pay appointed counsel the reasonable fees mandated by art. 26.05 "threatens to erode the confidence of court-appointed counsel throughout Harris County, if not the entire state. *Smith v. Flack*, 728 S.W.2d at 793. It is readily apparent that even 30 years after this Court decided *Smith*, these concerns apply with equal, if not greater, force and fervor in this case.

See In re Allen, 462 S.W.3d at 53 ("a mandamus proceeding is not the appropriate place to interpret statutory language, clarify this Court's precedent, or create law where there is none."). While this should be the end of the matter, the court of appeals' failure to engage in a meaningful statutory interpretation of art. 26.05 is itself a clear abuse of discretion.

This case required the court of appeals to resolve other issues of first impression that turned on its statutory interpretation of art. 26.05:

- whether the plain language of art. 26.05(a) irreconcilably conflicts with arts. 26.05(b) & (c) to the extent the former mandates that trial judges pay lawyers "reasonable attorney's fees" based on four factors, even as the latter mandate that all such payment be made in accordance with "fixed rates or minimum and maximum hourly rates."

- whether taking the plain language of art. 26.05(b) & (c) at face value in a manner that effectively strips trial judges of all discretion to pay the "reasonable attorney's fees" required by art. 26.05(a) leads to absurd consequences the legislature could not possibly have intended.

- whether taking the plain language of art. 26.05(b) & (c) at face value in a manner that effectively strips trial judges of all discretion to pay the "reasonable attorney's fees" required by art. 26.05(a) is a violation of the separation of powers doctrine.

The court of appeals' failure to address these critical questions of first impression was a violation of its ministerial duty to address every

issue necessary to its resolution of this extraordinary matter.[46] It is yet another reason why awarding the Commissioners mandamus relief in this case of first impression is a clear abuse of discretion.

A. This Court's Authority That Frames Statutory Interpretation

Statutory construction is a question of law, and this Court reviews a lower court's interpretation of a rule, regulation, or statute *de novo*. *Harris v. State*, 359 S.W.3d 625, 629 (Tex.Crim.App. 2011). In construing a statute, this Court seeks "to effectuate the collective intent or purpose of the legislators who enacted the legislation." *Id.* (citations omitted). In interpreting statutes, this Court presumes the Legislature intended for the entire statutory scheme to be effective. *Mahaffey v. State*, 364 S.W.3d 908, 913 (Tex.Crim.App. 2012). This Court looks first to the literal text of the statue, reading words and phrases in context and construing them according to the rules of grammar and usage. *Harris v. State*, 359 S.W.3d at 629.

When statutory language is clear and unambiguous, this Court must

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[46] *See* Tex. R. App. P. 47.1 ("The court of appeals must hand down an opinion that addresses every issue raised and necessary to final disposition of the appeal."). The court of appeals' failure to discharge its ministerial duty is no less an abuse of discretion in an extraordinary proceeding than it is in a direct appeal; indeed, it is even more egregious.

give effect to its plain meaning, unless doing so would lead to absurd consequences the legislature could not have possibly intended. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex.Crim.App. 1991). Courts may not resort to extra-textual factors unless the language of the statute is ambiguous. *Bryant v. State*, 391 S.W.3d 86, 92 (Tex.Crim.App. 2012). Ambiguity exists when the statutory language may be understood by reasonably well-informed persons in two or more different senses; conversely, a statute is unambiguous when it permits only one reasonable understanding. *Id.* To determine the plain meaning of a statute, this Court is obligated to apply the canons of construction. *Rushing v. State*, 353 S.W.3d 863, 865 (Tex.Crim.App. 2011). Among the canons in the Code Construction Act, TEX. GOVT. CODE § 311.021, is a list of presumptions regarding legislative intent. When the Legislature enacts a statute, it is presumed that: (1) compliance with the constitutions of this state and the United States is intended; (2) the entire statute is intended to be effective; (3) a just and reasonable result is intended; (4) a result feasible of execution is intended; and (5) public interest is favored over any private interest.

The most important factor in an appellate court's resolution of a matter of statutory interpretation is context. As the Texas Supreme

Court has opined:

> *Text cannot be divorced from context. It is said that text without context is pretext.* This is a straightforward, well-defined interpretative principle, one we have asserted frequently and applied assiduously. The law, after all begins with language, and one cardinal rule of language – not just *legal* language but *all* language – is this: "Language cannot be interpreted apart from context."[47]

Even though context is the cornerstone of statutory construction, it played no part in the court of appeals' analysis. Nor did the canons of construction. Given its acceptance of the plain text of art. 26.05(b) & (c), at the expense of the plain language of art. 26.05(a) and Rule 4.01B without regard to context the court of appeals decision is little more than pretext. It is, indeed, a clear abuse of discretion.

*B. What the Court of Appeals Acknowledged About Rule 4.01*B

Before finding that the Collin County Board of Judges exceeded their authority in enacting Rule 4.01B, the court of appeals acknowledged that:

- This provision is presumed to be valid.
- In delegating the task of collectively establishing a fee schedule, the legislature gave the judges "broad authority."

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[47] *Cadena Comercial v. Alcoholic Beverage*, 518 S.W.3d 318, 353 (Tex. 2017)(Willett, J., *dissenting*)(citations and footnotes omitted).

- The legislature recognized that trial court judges in each county were in the best position to determine what rates were reasonable in their jurisdictions.

- The legislature had not enacted any monetary limits on fees.

- Trial judges have discretion to take actions that ensure the proper functioning of their courts.

Slip op. at 5, 6, 7-8.

The court of appeals admitted that it was "not surprising that *many* Texas counties" have schedules with the same "unusual circumstances" language of Rule 4.01B, slip op. 8. (emphasis added). That is a fatal flaw. In fact, fee schedules contain similar language in more than "many Texas counties," but in 168 out of 254 – 66 percent. This suggests that there was a virtual state-wide consensus among trial judges that they could not meet the mandate in art. 26.05(a) to pay "reasonable" attorney's fees without inherent discretion to deviate from 26.05(b) & (c). In other words, Rule 4.01B was not valid because 168 counties – 66 percent of Texas counties incorporated its language, two-thirds of all Texas' counties did so *because it was right.* Viewed through this lens, the court of appeals' conclusion that the board of judges exceeded their authority in enacting Rule 4.01B

is unsupportable.[48]

C. The Cases the Court of Appeals Relied on to Invalidate Rule 4.01B Are Neither Binding on this Court Nor Even Remotely on Point

Another notable flaw in the court of appeals' analysis is its reliance on three cases to defend its unwarranted invalidation of Rule 4.01B which do not support the great weight rested upon them, given the demanding standard of review in this extraordinary action of first impression.

The one case the court of appeals cites to scuttle the fee schedules in 177 Texas counties is *Tex. Fire & Cas. Co. v. Harris Cty. Bail Bond Bd.*, 684 S.W.2d 177, 179 (Tex.App.– Houston [14th Dist. 1984, writ ref'd n.r.e.) (Harris County Bail Bond Board's local rule requiring a $100,000 security deposit to be licensed as a Harris County bondman exceeded its authority) Slip op. 9. This 33-year-old case is not binding on this Court and is factually distinguishable as well.

The court of appeals' reliance on the two cases cited for its assertion that Judge Gallagher's order is void, slip op. 9, fares no better. *State Bd.*

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[48] The court of appeals admission that "clearly [Rule 4.01B] functions without controversy – until it doesn't. *And it did not here.*" slip op. 8 (emphasis added), defines the underlying narrative of this case: it was no coincidence that the only county commissioners who challenged the validity of a rule that broke no new ground and was enacted by their own board of judges, just happened to be the personal friends, long-time supporters, and political benefactors of the defendant, the sitting Texas Attorney General.

of Ins. v. Betts, 315 S.W.2d 279, 282 (Tex. 1958), a Texas Supreme Court case dating back to the Eisenhower administration, is not just factually distinguishable, it is not binding on this Court.[49] And, *State ex rel. Bryan v. McDonald*, 642 S.W.2d 492, 494 (Tex.Crim.App. 1982), a garden-variety mandamus case where the trial judge's order was clearly prohibited by the plain language of the statute, merely restates the obvious.[50]

Relying on these authorities, while ignoring the precedential effect of more recent, and more controlling authority from this Court, the court of appeals' decision was a clear abuse of discretion.

*D. The Court of Appeals Failed to Recognize Its Reliance on the Plain Language of Arts. 26.05(b) & (c) to Invalidate Rule 4.01*B *Leads To Absurd Consequences the Legislature Could Not Have Intended*

In addition to the court of appeals' failure to engage in the required statutory construction, it did not engage in any substantive interpretation of arts. 26.05(a)(b) & (c).

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[49] *Betts* found that a trial judge's order that a person other than a liquidator designated by the State Insurance Commissioner be designated as a receiver was void. Because this order was made in violation of a statute that clearly prohibited the order, *Betts'* holding is not simply unremarkable, it is miles away from meeting the exacting standard for mandamus relief in cases of first impression.

[50] The trial judge in *Bryan* granted a motion for shock probation filed five days after the trial court lost jurisdiction according to the plain language of the statute. Indeed, in an aside that clearly takes it out of the ambit of this matter of first impression, but unmentioned by the court of appeals, this Court explained, "This is not the first time we have seen such a factual situation." *Id.* at 493.

1. The Irreconcilable Conflict Between
Art. 26.05(a) and Arts. 26.05(b) & (c)

Art. 26.05(a) provides that appointed defense counsel:

...shall be paid a reasonable attorney's fee for performing the following services, based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel.

(1) time spent in court making an appearance on behalf of the defendant as evidenced by a docket entry, time spent in trial, and time spent in a proceeding in which sworn oral testimony is elicited;

(2) reasonable and necessary time spent out of court on the case, supported by any documentation that the court requires;

(3) preparation of an appellate brief and preparation of oral argument to a court of appeals or the Court of Criminal Appeals; and

(4) preparation of a motion for rehearing.

Art. 26.05(b) provides that:

All payments made under this article shall be paid in accordance with a schedule of fees adopted by formal action of the judges of the county courts, statutory county courts, and district courts trying criminal cases in each county.

Art. 26.05(c) provides that:

Each fee schedule adopted shall state reasonable fixed rates or minimum and maximum hourly rates, taking into consideration reasonable and necessary costs and the availability of qualified attorneys willing to accept the stated

rates...

The focal point in the statutory construction of these provisions is what the Legislature meant by "reasonable attorney's fees." If a statute is silent, "In determining the plain meaning of a word, we initially look to dictionary definitions." *State v. Holcombe*, 187 S.W.3d 496, 500 (Tex.Crim.App. 2006). "Reasonable" has been variously defined as "as much is appropriate, fair or proper." *See, e.g.*, www.merriam-webster.com.

Viewed against this backdrop, the plain language of art. 26.05(a) imposing a duty on the trial judge to pay "reasonable attorney's fees," based on the factors outlined above further illustrates why the court of appeals' decision was a clear abuse of discretion.

First, at least one court of appeals has held that, "*article 26.05 as a whole recognizes the application of judicial discretion to an award of attorney's fees* because it provides for 'a reasonable attorney's fee' that 'is based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel.'" *In re Perkins*, 512 S.W.3d at 432 (emphasis added). Second, although leave to file writ of mandamus was denied in *Perkins*, three judges of this Court noted, "By the plain language of Art. 26.05(c), *the determination of an appropriate*

payment is at the discretion of the judge." *In re Perkins*, 502 S.W.3d at 816-17 (Johnson, J., joined by Richardson & Newell, JJ., *concurring*)(emphasis added). Third, each factor informing the trial judge's award of reasonable attorney's fees in art. 26.05(a) fortifies the conclusion that because all work performed by the Special Prosecutors in the two-year pre-trial stage of this prosecution was both reasonable and necessary, their attorney's fees, according to the plain language of art. 26.05(a), are reasonable. Judge Alcala, joined by Judge Meyers, dissented from the denial of leave to file writ of mandamus against a trial judge who declined to pay second-chair counsel for his efforts at obtaining a life sentence for the defendant in a case where the State sought the death penalty. As Judge Alcala concluded:

> The question permitted under the statutory language [of art. 26.05(a)] is whether the work was performed and whether the work was 'reasonable and necessary time spent out of court on the case.' ... Given that the trial-court judge hired [counsel] to represent the defendant and agreed to pay him $150 per hour for his work, and given that there is no evidence that [counsel] did not perform the work or that the work performed was unreasonable or unnecessary, mandamus relief is appropriate in this case.

In re Perkins, 502 S.W.3d at 821 (Alcala, J., joined by Meyers, J., *dissenting*).

The court of appeals' decision is squarely foreclosed by the reasoning and analysis embraced by five members of this Court in *Perkins* that the plain language of art. 26.05(a) gives trial court judges inherent discretion to pay reasonable attorney's fees. The court of appeals' relied on the plain language of arts. 26.05 (b) & (c) to hold otherwise, invalidating Rule 4.01B without attempting to construe these statutes consistently and giving effect to the provisions of each of them.[51] *See Azeez v. State*, 248 S.W.3d 182, 192 (Tex.Crim.App. 2008); *In re Perkins*, 512 S.W.3d at 431. Its invalidation of Rule 4.01B, a precept whose recognition of trial court discretion is shared by the other 176 counties whose fees schedules mirror its language, and by five members of this Court in *Perkins*, on the reed-thin authority of a 1984 appellate court case involving the Harris County Bail Bond Board, is a clear abuse of discretion.

2. The Plain Language of Arts. 26.05(b) & (c) the Court of Appeals Held Requires Paying the Special Prosecutors the Pre-Trial Rate Mandated by the Collin County Fee Schedule Leads to Absurd Results the Legislature Could Not Possibly Have Intended

The court of appeals' analysis leads to absurd results the Legislature

[51] The court of appeals' refusal to recognize that Rule 4.01B operates as a savings clause that reconciles the conflict between art. 26.05(a) and art. 26.05(b) & (c), and achieves the aim of perhaps the most important canon of construction, yet notably one the court of appeals elected not recognize or apply, is yet another reason why it clearly abused its discretion in this matter of first impression.

could not have intended. As the court of appeals pointed out, Rule 4.01A mandates without exception that the Special Prosecutors be paid $1,000 each, slip op. 3, for the over two years of intensive work they have performed in a case that is complex, time consuming, and high-profile. This result is most assuredly one that the Legislature could not possibly have envisioned, much less intended.[52]

Aside from not engaging in meaningful statutory interpretation, the court of appeals observed that Rule 4.01B "thwarts what we perceive to be the objectives of [art. 26.05(c)], which is to ensure by means of a duly adopted fee schedule," that:

> (1) appointed attorneys – in this case the prosecutors pro tem – are paid a *fair*, but not *excessive*, fee and (2) *the commissioners court*, which is tasked with the responsibility of settling and directing payments of accounts against the

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[52] Art. 2.07(c) mandates that he "shall receive compensation in the same manner and amount as an attorney appointed to represent an indigent person." When art. 2.07 was enacted in 1965, it did not include language specifying the manner and amount of funding a *pro tem* would receive. Art. 2.07 was not amended to provide *pro tems* would be paid in the same manner and amount as appointed counsel in indigent matters until May 23, 1973, almost a quarter century before the Fair Defense Act mandated the creation of fixed fee schedules. As part of its refusal to discuss context, the court of appeals did not recognize that, with the possible exception of capital litigation, the duties of a special prosecutor are almost never the same as appointed defense counsel. Unlike most criminal cases, almost every *pro tem* case is complex, time-consuming, involves considerable pre-trial investigation and litigation that can last months, if not years, will almost always go to trial, is often high-profile, and conducted against top-tier defense lawyers. These facts and circumstances frame the factual and procedural narrative of this case and inform the statutory construction of art. 26.05 that the court of appeals failed to conduct.

> county, *can more accurately project the expenses of a fiscal year and budget accordingly.*

Slip op. 7. (emphasis added).

But what the court of appeals "perceived" as the twin objectives of art. 26.05(c), is both unsupported and unsupportable. First, nowhere in art. 26.05(c), indeed, in arts. 26.05(a) or (b) are the words "excessive" or "fair" mentioned; the term of art that is used in both (a) and (c) is "reasonable." In the latter provision, "reasonable" is used in conjunction with the phrase "fixed rates" and in the former, "reasonable" is defined by the factors in §§ 1-4. The canons of construction the court of appeals failed to employ foreclose its "perception" that any notions of what is "excessive" or "fair" drove the Legislature's intent in enacting art. 26.05(c).

The court of appeals' claim that the latter objective the Legislature intended to inform art. 26.05(c), the Commissioners ability to accurately project the fiscal year expenses and budget accordingly, is unpersuasive. This *ad hoc* assertion is without support in statutory authority, case law, or legislative history. Notwithstanding its failure to cite any authority or legislative intent that fortifies this pronouncement, the court of appeals' conclusion is a *non sequitur* because the Commissioners could have

extrapolated from the Special Prosecutors' bills in December of 2015, how much their fees would likely cost Collin County.

E. This Court's Precedent on Legislative Authority to Delegate

This Court has noted that, "It is difficult to define clearly the line between an unlawful delegation of legislative power and a proper grant of authority to perform acts strictly not legislative..." *Ex parte Granviel*, 561 S.W.2d 503, 514 (Tex.Crim.App. 1978). While this admonition suggests that the court of appeals' invalidation of Rule 4.01B in an extraordinary matter involving an issue of first impression would be a clear abuse of discretion, there are several other reasons why this is true. Of equal import is the court of appeals' failure to consider that the Commissioners had to demonstrate that Rule 4.01B's provisions were not "in harmony with the general objectives of [arts. 26.05(b) & (c)]." *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 750 (Tex. 1995). Once again, the court of appeals' silence is understandable. Because Rule 4.01B acts as a savings clause to reconcile and give effect to the inherent conflict in the plain language of arts. 26.05(a)(b) & (c), it is clearly "in harmony with the general objectives" of these precepts.

Almost four decades ago, this Court made it clear that because:

> The existence of an area for exercise of discretion by an administrative officer under delegation of authority does not render delegation unlawful where standards formulated for guidance and limited discretion, though general, are capable of reasonable application. ... *the trend of modern decisions is to uphold such laws.*[53]

Nothing over the past forty years has changed this Court's mind set:

> When the Legislature itself cannot practically or efficiently perform the functions required, it has the authority to delegate some agency to carry out the purpose of such legislation. So once the Legislature declares a policy and sets a "primary standard," it may authorize an agent to prescribe the necessary details to carry out a law's purpose. A legislative grant of discretionary authority to an agent designated to carry out a legislative policy is proper when the Legislature has set standards for guidance that are capable of reasonable application.
>
> *So long as the statute is sufficiently complete to accomplish the regulation of the particular matters falling within the Legislature's jurisdiction, the matters of detail that are reasonably necessary for the ultimate application, operation and enforcement of the law may be expressly delegated to the authority charged with the administration of the statute.*

Martinez v. State, 323 S.W.3d 493, 501 (Tex.Crim.App. 2010)(permitting

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[53] *Ex parte Granviel*, 561 S.W.2d at 514 (emphasis added)(citations omitted). While the court of appeals cited *Granviel*, slip op. 5, it neither referred to this portion of its decision, nor to its holding rejecting the claim that giving the Director of the Texas prison system the ability to determine the lethal substances used in executions constituted the very type of improper delegation of authority the court of appeals relied on to invalidate Rule 4.01B. *See also Langford v. State*, 532 S.W.2d 91, 95 (Tex.Crim.App. 1976)(rejecting claim that statute delegating authority to Department of Public Safety to approve methods of breath testing in DWI cases was invalid).

imposition of reasonable requirements when enjoining street gang activity was not an improper delegation of authority to trial judges by the Legislature)(footnotes and citations omitted). *See also State v. Rhine*, 297 S.W.3d 301, 306-07 (Tex.Crim.App. 2009)(rejecting claim that Legislature unconstitutionally delegated power to prohibit or control the outdoor burning of waste to the Texas Commission on Environmental Quality).

This Court's holdings in *Martinez*, *Rhine*, *Granviel*, and *Langford* are critical in identifying a crucial weakness in the court of appeals' analysis. In these cases, this Court did precisely what the court of appeals did not – engage in meaningful statutory interpretation by following the canons of statutory construction. Had the court of appeals done so, its analysis would have entailed more than merely recognizing Rule 4.01B's presumed validity. It would have gone further, recognizing the canons of statutory construction required it to construe arts. 26.05(a), (b) & (c) consistently to give effect to them all. *See Azeez v. State*, 248 S.W.3d at 192 ("Any conflict between [two] provisions will be harmonized, if possible, and effect will be given to all the provisions of each act if they can be made to stand together and have concurrent efficacy."); *In re Perkins*, 512 S.W.3d at 431 (construing local rule's fee schedule mandated by arts.

26.05(b) & (c) with art. 26.05(a) consistently and giving effect to both to find trial judge's decision on payment of reasonable attorney's fees was discretionary). The court of appeals' failure to do so constitutes a clear abuse of discretion.

IV. The Court of Appeals Grant of Mandamus Relief in this Question of First Impression Violates the Separation of Powers Doctrine

The plain language in art. 26.05(c) that the court of appeals relied on to divest trial judges in Texas of discretion to pay reasonable attorney's fees mandated by art. 26.05(a) also violates the separation of powers doctrine.

"Our ingenious constitutional design features 'three distinct departments,' none of which shall exercise any power properly attached to either of the others. In fact, the Texas Constitution takes Madison a step further by including, unlike the Federal Constitution, an explicit Separation of Powers provision to curb overreaching and to spur rival branches to guard their prerogatives." *Henry v. Cox*, 520 S.W.3d 28, 38 (Tex. 2017)(footnotes and citations omitted). This Court has echoed these sentiments in holding that the Separation of Powers Clause prohibits one branch of government from exercising a power inherently belonging to

another branch or from unduly interfering with another branch so that it cannot effectively exercise its constitutionally assigned powers. *Jones v. State*, 803 S.W.2d 712, 715-16 (Tex.Crim.App. 1991). "[A]ny attempt by one department of government to interfere with the powers of another is null and void." *Ex parte Giles*, 502 S.W.2d 774, 780 (Tex.Crim.App. 1974). A constitutional violation occurs when the core functioning of the judicial process in a field constitutionally reserved to the control of the courts is interfered with by the executive or legislative branches. *Id.* at 716; *see also Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex.Crim.App. 1990)(legislature may not interfere in any core judicial functions).

This Court has not wavered in its belief that "the Legislature may not unduly interfere with the judicial function under the guise of establishing rules of court." *Armadillo Bail Bonds v. State*, 802 S.W.2d at 241. But because the court of appeals' interpretation of art. 26.05(c) divests trial court judges in Texas of discretion to pay the reasonable attorney's fees mandated by art. 26.05(a), it violates the separation of powers doctrine. The court of appeals' holding conflicts with this Court's

precedent that compels a contrary result.[54]

The court of appeals' holding is also at odds with authority from the Texas Supreme Court. In *Vondy v. Commissioners Court of Uvalde Cty.*, 620 S.W.2d 104, 109 (Tex. 1981), the Supreme Court "recognized the necessity of [the district courts'] inherent power to compel payment of sums of money if they are reasonable and necessary in order to carry out the court's mandated responsibilities." More importantly, in this case, "[t]his inherent power is also necessary to protect and preserve the judicial powers from impairment or destruction." *Id.*

While not cited in the court of appeals' opinion, the Commissioners relied on *Henry v. Cox*, 520 S.W.3d 28, 37 (Tex. 2017), which held that the district court lacked authority to require commissioners court to reinstate a county employee at a salary outside the range set by the commissioners. In *Henry*, the commissioners were empowered by statute to set a salary

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[54] *See,e.g., Meshell v. State*, 739 S.W.2d 246, 257 (Tex.Crim.App. 1987)(Texas Speedy Trial Act violated Separation of Powers Clause because it improperly encroached on prosecutorial discretion); *Rose v. State*, 752 S.W2d 529, 531 (Tex.Crim.App. 1987)(jury instruction on parole law violated Separation of Powers Clause because it unduly interfered with Executive Branch's clemency authority); *Armadillo Bail Bonds v. State*, 802 S.W.3d at 241 (art. 22.16(c)(2) "unduly interferes with the Judiciary's effective exercise of its constitutionally assigned power" and violated Separation of Powers Clause); *Williams v. State*, 707 S.W.2d 40, 45 (Tex.Crim.App. 1986)(statute requiring trial court to remit at least 95 percent of forfeited bond unduly interfered with judiciary's authority over amount of forfeited bond to be remitted and violated Separation of Powers Clause).

range; here, the Legislature has given this authority to the district judges. Without a specific statute conferring authority on the commissioners as in *Henry*, the only way to avoid a separation of powers violation is to respect a trial court's inherent authority to make the criminal justice system work.

V. Because the Commissioners' Claim is Barred by the Equitable Doctrine of Laches, Mandamus Relief is Inappropriate

In *In re Medina*, 475 S.W.3d at 297, this Court noted that, "Equitable principles are necessarily involved when we consider whether mandamus ... should issue." *See also Ex parte Bowman*, 447 S.W.3d 887, 888 (Tex.Crim.App. 2014)(per curiam)(equity and fairness apply to any extraordinary matter). Viewed through this lens, given the unreasonable, unjustified, and prejudicial delay seeking relief, the Commissioners were not entitled to mandamus relief.

This Court has recognized that the equitable defense of laches is applicable in criminal law matters in the context of post-conviction writs of habeas corpus, another form of extraordinary relief, and can bar relief when the State is harmed as a result of an unreasonable delay in filing a writ. *Ex parte Perez*, 398 S.W.3d 206, 215 (Tex.Crim.App. 2013). For the

State to prevail on a laches claim, it must show by a preponderance of evidence that there has been an unreasonable delay in bringing the extraordinary action, and that it was harmed as a result of the delay. *Id.* at 210 n. 3. To determine if the delay was unreasonable, this Court may consider the length of the delay in filing the action, the reasons for the delay, and the degree and type of prejudice resulting from the delay. *Id.* at 217. In considering whether prejudice has been shown, this Court may consider anything, including circumstantial evidence, that places the State in a less favorable position in defending the claim. *Id.* at 215.

Based on these criteria, the Commissioners' mandamus claim is barred by laches. First, the Commissioners 18-month delay seeking relief was unreasonable. Second, the Commissioners' insistence on sleeping on their rights clearly prejudiced the Special Prosecutors, who continued to work in good faith, have not been paid for their efforts in 18 months, and the Commissioners agreed to pay without objection.

On this record and in this extraordinary proceeding where equity and fairness are paramount, *Ex parte Bowman*, 447 S.W.3d at 888; *In re Medina*, 475 S.W.3d at 297, the court of appeals clearly abused its discretion in failing to recognize that the Commissioners' mandamus

claim was barred.[55] Because the court of appeals' failure to recognize that mandamus was barred by laches, its insistence in employing mandamus "as scales in which to bridge the gap between broken and disconnected facts," *Knowles v. Scofield*, 598 S.W.2d at 860, is yet another reason why it clearly abused its discretion.

VI. Conclusion

Whether the Commissioners' claim would carry the day if it had been litigated in the trial court is irrelevant. The fact that it requires this Court to plow new ground to resolve it compels the conclusion that the court of appeals clearly abused its discretion in granting mandamus relief in this question of first impression. Because this case comes to this Court via writ of mandamus, involves a question of first impression, and its impact looms large for prosecutors, defense lawyers, and trial judges in Texas, this Court cannot permit the court of appeals' decision to stand.

This case is about whether the Legislature intended to prevent trial court judges from paying reasonable attorney's fees in extraordinary

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[55] While the Special Prosecutors did not raise this claim in the court of appeals, this Court has held that because an appellate court may consider a laches claim *sua sponte*, it may be raised for the first time at any stage of the appellate process, which would include this extraordinary matter. *Ex parte Bowman*, 447 S.W.3d at 888; *Ex parte Smith*, 444 S.W.3d 661, 664-65 (Tex.Crim.App. 2014).

cases. The Texas Supreme Court has already answered this question:

> The legislative branch of this state has the duty to provide the judiciary with the funds necessary for the judicial branch to function adequately. If this were not so, a legislative body could destroy the judiciary by refusing to adequately fund the courts. *The judiciary must have the authority to prevent any interference with or impairment of the administration of justice in this state.*

Vondy v. Commissioners Court of Uvalde Cty., 620 S.W.2d at 110. (emphasis added). This holding applies with equal force to the Collin County Commissioners Court.

As Justice Benjamin Cardozo famously remarked, "Justice, though due to the accused, is due the accuser also. The concept of fairness cannot be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934). Keeping the balance true, not just in this extraordinary matter, but in our criminal justice system, compels this Court to conclude that because the court of appeals' decision is a clear abuse of discretion, the Special Prosecutors are entitled to mandamus relief.

PRAYER FOR RELIEF

Relator 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 SERVICE

Pursuant to Tex. R. App. P. 9.5(d), I certify that this document was served on all counsel of record via electronic filing on September 19, 2017.

/s/ BRIAN W. WICE

BRIAN W. WICE

NO. _____

IN THE

COURT OF CRIMINAL APPEALS

IN RE THE STATE OF TEXAS EX REL. BRIAN W. WICE, RELATOR.

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

RELATOR'S APPENDIX

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ORAL ARGUMENT REQUESTED

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TAB 1

Conditionally Grant and Opinion Filed August 21, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00634-CV
No. 05-17-00635-CV
No. 05-17-00636-CV

IN RE COLLIN COUNTY, TEXAS, COUNTY COMMISSIONERS, Relators

Original Proceeding from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause Nos. 416-81913-2015, 416-82148-2015, 416-82149-2015

OPINION

Before Justices Francis, Brown, and Schenck
Opinion by Justice Francis

In this original proceeding, the Collin County Commissioners Court seeks a writ of mandamus compelling the trial court to vacate an order for payment of attorney's fees. Because we conclude the order requiring payment is void, we grant the relief requested.

This is the fifth appeal or original proceeding regarding an order of payment of attorney's fees in these cases. *See Blackard v. Schaffer*, No. 05-17-00094-CV, 2017 WL 2493279 (Tex. App.—Dallas June 9, 2017, no pet.) (mem. op.); *Blackard v. Schaffer*, No. 05-16-00408-CV, 2017 WL 343597 (Tex. App.—Dallas Jan. 18, 2017, pet. filed) (mem. op.); *In re Blackard*, No. 05-16-00470-CV, 2016 WL 1756843 (Tex. App.—Dallas Apr. 29, 2016, orig. proceeding) (mem. op.); *In re Blackard*, No. 05-16-00478-CV, 2016 WL 1756786 (Tex. App.—Dallas Apr. 29, 2016, orig. proceeding) (mem. op.). This is the first time, however, that the Collin County

Commissioners Court has sought relief. Although the procedural history of these cases is complicated, the facts relevant to this particular proceeding are straightforward.

The Collin County Criminal District Attorney recused his office from all matters involving the *State of Texas v. Warren Kenneth Paxton, Jr.*, Case Nos. 416-81913-2015, 416-82148-2015, and 416-82149-2015, in the 416th Judicial District Court (the Paxton cases). Judge Scott Becker, the Local Administrative Judge of Collin County, appointed Kent A. Schaffer, Brian W. Wice, and Nichole DeBorde to serve as criminal district attorneys pro tem in those cases. *See* TEX. CODE CRIM. PROC. ANN. art. 2.07(a) (West 2005). Judge Becker agreed to pay each attorney a fee of $300 an hour for his or her professional services.

Under article 2.07(c) of the Texas Code of Criminal Procedure, an attorney pro tem is entitled to receive compensation in the same amount and manner as an attorney appointed to represent an indigent person. *Id.* art. 2.07(c). Compensation for appointed attorneys is governed by article 26.05 of the code. TEX. CODE CRIM. PROC. ANN. art. 26.05 (West Supp. 2016). Article 26.05 states that all compensation "shall be paid in accordance with a schedule of fees adopted by formal action of the judges of the county courts, statutory county courts, and district courts trying criminal cases in each county." *Id.* art. 26.05(b). The article further requires that "[e]ach fee schedule adopted shall state reasonable fixed rates or minimum and maximum hourly rates, taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates . . . ." *Id.* art. 26.05(c). Compensation payments are made from the general funds of the county in which the prosecution was instituted. *Id.* art. 26.05(f).

As required by article 26.05, the judges of the district courts trying criminal cases in Collin County adopted local rules relating to the appointment and compensation of appointed

counsel in felony cases. At all times relevant to this proceeding, section 4.01 of the local rules stated:

> A. The District Judges adopt, pursuant to Article 26.05 Tex. Code of Crim. Proc., a fee schedule for appointed attorneys, attached hereto as "Fee Schedule for Appointed Attorneys."
>
> B. 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.

The fee schedule adopted under rule 4.01A provides, in part, that "[i]n all felony cases, except as hereafter provided, counsel shall be paid according to the . . . fee schedule, without exception," at the hourly rate of $150 for death penalty pleas, the hourly rate of $100 for capital non-death penalty pleas, a fixed fee of $1,000 for first-degree felony pleas, a fixed fee of $750 for second-degree felony pleas, a fixed fee of $500 for third-degree and state jail felony pleas, a fixed fee of $250 for pleas in other cases, a fixed fee of $1,000 for pre-trial preparation, and a fixed fee of $500 for each one-half day of trial. The fee schedule also provides for three categories of discretionary adjustments; as relevant in these cases, the presiding judge is given discretion to adjust the fee upward in an amount not to exceed $1,000.

Judge Becker apparently relied on section B of rule 4.01 when he reached the fee agreement with the attorneys pro tem. In accordance with that agreement, on December 11, 2015, the attorneys pro tem submitted interim requests for compensation totaling $254,908.85 for pre-trial work, which included $242,025 of attorney's fees based on a rate of $300 per hour. Judge George Gallagher approved the requests and, on January 6, 2016, signed an order of payment.[1] The order referenced local rule 4.01B and provided that "payment of attorneys [sic] fees to Attorneys Pro Tem in these causes shall deviate from the fee schedule and each attorney

[1] Judge Gallagher, a district court judge in Tarrant County, was assigned to the Paxton cases after the district judges in Collin County recused themselves from all matters involving these cases.

shall be paid the amount in the hourly rate ordered to be paid in the Appointed Counsel Request for Compensation as submitted by the respective Attorney Pro Tem and as approved by the Court." The order further included, "This Order shall be enforceable by all sanctions available to the Court . . . ." The order was presented to the Collin County Auditor, who submitted it to the Commissioners Court for approval. At its January 11 meeting, the Commissioners Court approved the fee payments by a three-to-two vote. The attorneys were paid the full amount.

One year later, on January 4, 2017, Judge Gallagher signed the "Second Order on Payment of Attorney's Fees to Attorneys Pro Tem" approving a second set of interim requests for pre-trial compensation. The requests included $199,575 in attorney's fees billed at $300 per hour. The language of the second order was essentially identical to that of the first order and, again, the order was presented to the auditor who submitted it to the Commissioners Court for approval. This time, however, the commissioners rejected the requests for compensation and filed this petition for writ of mandamus to compel the trial court to vacate the second payment order.

The commissioners' petition was prompted, at least in part, by the fact that Collin County has already paid the attorneys pro tem in the Paxton cases far more than the amounts set out as reasonable in the Fee Schedule for Appointed Attorneys adopted by the Collin County district court judges. Again, payment of the attorney's fees was ordered on penalty of sanctions. In their petition, the commissioners contend, among other things, that both the payment order and rule 4.01B violate article 26.05 of the code of criminal procedure, rendering the payment order void.[2] Article 26.05 clearly requires district court judges to adopt a schedule of reasonable fees for appointed attorneys and to pay the appointed attorneys according to that schedule. We must

[2] In the most recent version of the local rules, the district court judges removed rule 4.01B. The new rules affect only indictments and motions to revoke filed on or after March 1, 2017.

decide whether the district court judges exceeded the authority granted them in article 26.05 by adopting rule 4.01B, which allows them to decide on an individual basis not to apply the fee schedule in a particular case.

Generally, the legislature may delegate the power to establish rules, regulations, or minimum standards reasonably necessary to carry out the expressed purpose of a legislative act. *See Ex parte Granviel*, 561 S.W.2d 503, 514 (Tex. Crim. App. 1978). Delegation of rule-making authority by the legislature may involve the exercise of discretion, but that discretion must be exercised within the standards formulated for guidance on the matter being regulated. *See Ex parte Smalley*, 156 S.W.3d 608, 610 (Tex. App.—Dallas 2004), *pet. dism'd*, 173 S.W.3d 71 (Tex. Crim. App. 2005). We presume a rule is valid unless the party challenging it can show the rule: (1) contravenes specific statutory language; (2) runs counter to the general objectives of the statute; or (3) imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions. *See Tex. State Bd. of Exam'rs of Marriage & Family Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 33–34 (Tex. 2017).

Article 26.05 of the code of criminal procedure is part of the Texas Fair Defense Act. *See* TEX. CODE CRIM. PROC. ANN. art. 1.051 (West Supp. 2016).[3] The purpose of the Fair Defense Act is to ensure that appropriate standards for appointment of counsel in criminal cases are developed and maintained. *See Ex parte Graves*, 70 S.W.3d 103, 115 n.51 (Tex. Crim. App. 2002). Article 26.05 mandates that appointed counsel be paid a "reasonable attorney's fee" for services performed. TEX. CODE CRIM. PROC. ANN. art. 26.05(a). The article further requires the judges of courts trying criminal cases to adopt a fee schedule that "shall state reasonable fixed

[3] *See* Act of May 24, 2001, 77th Leg. R.S., ch. 906, § 1, 2001 Tex. Gen. Laws 1800, 1800 (providing that 2001 revisions to article 1.051 may be known as the Texas Fair Defense Act).

rates or minimum and maximum hourly rates." *Id.* art. 26.05(b), (c). By requiring the judges to set both minimum *and* maximum hourly rates, it is clear the legislature was concerned not only with attorneys receiving a fair rate of payment, but also with counties not being forced to pay excessive fees. *Cf. Smith v. Flack*, 728 S.W.2d 784, 790 (Tex. Crim. App. 1987) (orig. proceeding) (former statute did not set maximum fee, leaving fee amount above minimum to individual judge's discretion).

In delegating the task of collectively establishing either a flat rate or range of hourly fees, the legislature gave the judges in this State broad authority, as evidenced by the absence of statutory minimum *or* maximum amounts for hourly rates, to create a schedule of fees that reflects the customary and reasonable fees in their jurisdiction. Article 26.05 was substantially revised in 1987 to eliminate a mandatory fee schedule set by the legislature and to require the county and district criminal court judges to adopt their own fee schedules. *See Hester v. State*, 859 S.W.2d 95, 98 (Tex. App.—Dallas 1993, no pet.). By doing so, the legislature recognized that the judges of each county are in the best position to determine the reasonable fee rates to be applied in their jurisdiction. And while the legislature enacted no monetary fee limits, it did provide that judges should consider certain factors when setting the fee schedule, including overhead costs and the availability of qualified attorneys willing to accept the stated rates. *See* TEX. CODE CRIM. PROC. ANN. art. 26.05(c). The statute does not prevent the judges from taking into consideration the possibility of "unusual circumstances" in setting the *range* of reasonable fees allowed. But the legislature intended each county to have an agreed framework that sets out the specific range of reasonable fees that could be paid. *Id.*[4]

[4] The statute, enacted in 1965, has been revised numerous times. As can be seen through the relevant amendments, it has evolved from one in which the legislature dictated minimum and maximum amounts, *see* Act of June 18, 1965, 59th Leg., R.S., ch. 722, 1965 Tex. Gen. Laws 317, 425, to the legislature setting only a minimum amount to be paid, *see* Act of May 26, 1971, 62nd Leg., R.S., ch. 520, § 1, 1971 Tex. Gen. Laws 1777, to the legislature delegating to the criminal judges the task of setting a fee schedule that "include[d]" a fixed rate, minimum and maximum hourly rates, and daily rates, *see* Act of May 30, 1987, 70th Leg., R.S., ch. 979, § 3, 1987 Tex. Gen. Laws 3321, 3323, to the current version,

Here, although the Collin County district court judges adopted a fee schedule as mandated by article 26.05, they also adopted rule 4.01B, allowing individual judges the discretion to disregard the previously determined schedule and set fees in any amount. The plain language of article 26.05, however, limits the judges' authority to only setting a fee schedule. *See id.* art. 26.05(c). The statute 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. The statute's legislative history supports this conclusion as article 26.05 was amended in 2001 to require the fee schedule "state" rather than merely "include" reasonable fixed rates or minimum and maximum hourly rates. *See* Senate Comm. on Criminal Justice, Bill Analysis, Tex. S.B. 7, 77th Leg., R.S. (2001). Rule 4.01B thwarts what we perceive to be the objectives of the statute, which are to ensure by means of a duly adopted schedule that (1) appointed attorneys—in this case the prosecutors pro tem—are paid a fair, but not excessive, fee and (2) the commissioners court, which is tasked with the responsibility of settling and directing payments of accounts against the county, can more accurately project the expenses of a fiscal year and budget accordingly. By adopting local rule 4.01B, the Collin County judges partially abdicated to the individual judges the responsibility delegated to them collectively to determine the reasonable fee for appointed counsel and rendered illusory the legislative requirement of setting and applying a fee schedule.

We acknowledge and respect the inherent power afforded the trial judges of this State to take certain actions to ensure the proper functioning of their courts. Trial judges must be able to evaluate, address, control, and effectively process the many cases assigned to their courts on a

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which provides the schedule "shall state reasonable fixed rates or minimum and maximum hourly rates . . ," *see* Act of May 17, 2001, 77th Leg., R.S., ch. 906, § 8, 2001 Tex. Gen. Laws 1800, 1807.

daily basis. This includes the responsibility of appointing qualified, experienced attorneys who possess the skills necessary to do the job required, while at the same time fully recognizing the attorneys appointed will likely be paid a fee much less than a retained attorney would command. The complexity of these cases can vary greatly, from misdemeanor pleas to death penalty trials. In rare circumstances, the cases can take on a life of their own, consuming much of the attorney's time, to the detriment of other cases, or perhaps require a specialized knowledge for the prosecution or defense. So it is not surprising that many Texas counties follow fee schedules containing the same "unusual circumstances" language of rule 4.01B and, from the dearth of litigation on the issue, clearly the provision functions without controversy—until it doesn't. And it did not here.

But limiting the scope of the fees that may be paid to an appointed attorney does not eliminate the discretion of the individual trial judge, regardless of the simplicity or complexity of the case. *See Hester*, 859 S.W.2d at 97. Each judge trying criminal cases participates in the creation of the fee schedule. *See* TEX. CODE CRIM. PROC. ANN. art. 26.05(b). If the judges collectively choose to adopt a range of hourly fees, each judge has discretion within that range to set the fee in an individual case, taking into account the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel. *Id.* art. 26.05(a). After the fee has been set in an individual case, the judge is free to disapprove the payment request as not being reasonable if he concludes the work performed by the attorney does not support the total amount of fees requested. *Id.* art. 26.05(c); *see also In re Perkins*, 512 S.W.3d 424, 432 (Tex. App.—Corpus Christi 2016, orig. proceeding).

After examining the language of article 26.05 and considering the clear objectives of that statute, we conclude the criminal district court judges exceeded the authority delegated to them under 26.05 by adopting local rule 4.01B. Article 26.05 mandates that attorney's fees be paid

according to a schedule. Both rule 4.01B and Judge Gallagher's second order of payment contradict this mandate. The judges exceeded their authority in adopting rule 4.01B. *See Tex. Fire & Cas. Co. v. Harris Cty. Bail Bond Bd.*, 684 S.W.2d 177, 179 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (invalidating bail bond board's local rule that imposed additional and conflicting burdens from those provided by statute). Consequently, Judge Gallagher's second order of payment, which relies on rule 4.01B and deviates from the mandated fee schedule, is void. *See State Bd. of Ins. v. Betts*, 315 S.W.2d 279, 282 (Tex. 1958) (orig. proceeding) (concluding order in contravention of valid statutory enactment is void); *State ex rel. Bryan v. McDonald*, 642 S.W.2d 492, 494 (Tex. Crim. App. 1982) (orig. proceeding) (granting mandamus relief after determining judge's order of shock probation was in conflict with statute, leaving judge without jurisdiction and rendering order void).

Having determined the second order of payment is void, we now address the appropriateness of mandamus relief. The Texas Constitution provides that a commissioners court "shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed." TEX. CONST. art. V, § 18(b). The legislature thereafter provided that each commissioners court of a county shall audit and settle all accounts against the county and shall direct the payment of those accounts. TEX. LOC. GOV'T CODE ANN. § 115.021 (West 2008).

Mandamus is intended to be an extraordinary remedy, available only in limited circumstances. *Smith*, 728 S.W.2d at 792; *see Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989) (orig. proceeding). Typically, mandamus relief is appropriate only where the trial court has failed to perform a ministerial act and a party has no adequate remedy by appeal. *Smith*, 728 S.W.2d at 792. But, if an order is void, the relator need not show it does not have an adequate appellate remedy, and mandamus relief is appropriate. *In re Sw. Bell Tel. Co.*,

35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding); *In re State ex rel. Robinson*, 116 S.W.3d 115, 117 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding).

The attorneys pro tem contend mandamus relief is not appropriate in this case because Judge Gallagher relied on what he presumed was a valid local rule when he issued the payment order. They argue his action could not have been an abuse of discretion where there was no existing authority declaring rule 4.01B invalid. *See In re Allen*, 462 S.W.3d 47, 53 (Tex. Crim. App. 2015) (orig. proceeding), *abrogated on other grounds by Petetan v. State*, No. AP-77,038, 2017 WL 915530 (Tex. Crim. App. Mar. 8, 2017).. While it is true in a criminal case that mandamus relief may not be appropriate if the law surrounding a court's action is unclear, an issue of first impression can qualify for mandamus relief where the principle of law on which the relator relies is "positively commanded and so plainly prescribed under the law as to be free from doubt." *See In re Medina*, 475 S.W.3d 291, 298 (Tex. Crim. App. 2015) (orig. proceeding). We note that the court of criminal appeals has previously concluded that granting mandamus relief based on a construction of article 26.05 was appropriate. *See Smith*, 728 S.W.2d at 792–94.

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. TEX. CODE CRIM. PROC. ANN. art. 26.05(a), (c). Judge Gallagher had no authority to order payment of fees in violation of article 26.05. Where a trial judge lacks authority to take a particular action, he has a ministerial duty to refrain from taking that action, to reject or overrule requests that he take such action, and to undo the action if he has already taken it. *See Medina*, 475 S.W.3d at 298.

We conclude mandamus relief is appropriate in this case. Based on our resolution of the issues discussed above, it is unnecessary for us to address relators' remaining arguments. We conditionally grant relators' petition for writ of mandamus. We order Judge Gallagher to vacate

the Second Order on Payment of Attorney's Fees to Attorneys Pro Tem. *Cf. In re Darling Homes*, No. 05-05-00497-CV, 2005 WL 1390378, at *4 (Tex. App.—Dallas June 14, 2005, orig. proceeding) (mem. op.) (ordering judge who no longer has jurisdiction over case to vacate void order).[5] A writ will issue only if Judge Gallagher fails to comply.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

170634F.P05

[5] On June 9, 2017, Judge Gallagher signed an order directing the Collin County District Clerk to transfer the cases to Harris County in accordance with our opinion conditionally granting a writ of mandamus on the issue. *See In re Paxton*, Nos. 05-17-00507-CV, 05-17-00508-CV, 05-17-00509-CV, 2017 WL 2334242, at *5 (Tex. App.—Dallas May 30, 2017, orig. proceeding). A Harris County district judge is now presiding over these cases.

TAB 2

Order entered August 21, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00634-CV
No. 05-17-00635-CV
No. 05-17-00636-CV

IN RE COLLIN COUNTY, TEXAS, AND COUNTY COMMISSIONERS, Relators

Original Proceeding from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause Nos. 416-81913-2015, 416-82148, & 416-82149-2015

ORDER

Based on the Court's opinion of this date, we **CONDITIONALLY GRANT** relators' petition for writ of mandamus. We order Judge George Gallagher to vacate the January 4, 2017 Second Order on Payment of Attorney's Fees to Attorneys Pro Tem. Should Judge Gallagher fail to comply with this order, the writ will issue. We **ORDER** Judge Gallagher to file with this Court, **within thirty (30) days of the date of this order**, a certified copy of his order issued in compliance with this order.

/s/ MOLLY FRANCIS
JUSTICE

TAB 3

Order entered September 1, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00634-CV
No. 05-17-00635-CV
No. 05-17-00636-CV

IN RE COLLIN COUNTY, TEXAS, AND COUNTY COMMISSIONERS, Relators

Original Proceeding from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause Nos. 416-81913-2015, 416-82148-2015, 416-82149-2015

ORDER

Before the Court is Attorney Pro Tem Brian W. Wice's motion to stay this Court's August 21, 2017 order conditionally granting the petition for writ of mandamus in this proceeding. We **GRANT** the motion and **STAY** this Court's August 21, 2017 order conditionally granting the petition for writ of mandamus. The stay shall expire at 11:59 p.m., September 27, 2017. *See* Emergency Order Authorizing Modification and Suspension of Court Procedures in Proceedings Affected by Disaster, Misc. Docket. No. 17-9091 (Tex. Aug. 28, 2017); *see also* Emergency Order Authorizing Modification and Suspension of Court Procedures in Proceedings Affected by Disaster, Misc. Docket. No. 17-010 (Tex. Crim. App. Aug. 28, 2017).

/s/ MOLLY FRANCIS
JUSTICE

TAB 4

Judicial Discretion Plan Review

Pursuant to Section 79.036 of the Texas Government Code, county indigent defense (ID) plans must be submitted to the Commission not later than November 1 of each odd-numbered year. The chart below details where local ID plans identify judicial discretion in relation to the published attorney fee schedule. As of August 25, 2017, 168 county ID plans address judicial discretion and 86 county ID plans do not address judicial discretion.

County	Judicial Discretion?	Relevant Language from Plan	Relevant Language from Fee Schedule
Anderson	No	The presiding judge will either approve the amount requested or enter written findings stating the amount of payment that the judge approves and each reason for approving an amount different from the requested amount.	none
Andrews	Yes	If a judge disapproves a request for compensation, the judge shall make written findings, stating the amount of payment that the judge approves and each reason for approving an amount different from the requested amount.	The Court may deviate from this schedule for good cause.
Angelina	No	If the trial judge recommends disapproval of the requested amount of payment, the Judge shall make written findings, stating the amount of amount different from the requested amount.	none
Aransas and San Patricio	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	Compensation for time spent by counsel for out of court or in court, found to be reasonable and necessary, shall be not less than $20 per hour nor more than $110 per hour. Total compensation per day shall not exceed $500, unless the court finds exceptional circumstances or that good cause exist for exceeding said total amount exists.	none

Archer	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	"Total compensation for all pre-trial, trial, post-trial, and appellate court appointed counsel services shall not exceed the following, unless the Court finds exceptional circumstances or that good cause for exceeding said total amount exists." Plus boilerplate cause	none
Armstrong, Potter, and Randall	No		none
Atascosa, Frio, Karnes, La Salle, and Wilson	Yes	boilerplate	The court may make an exception to the above hourly rates upon a showing that the rate would be unfair in a given case.
Austin	No	boilerplate	boilerplate
Bailey and Parmer	Yes	boilerplate	"For good cause or exceptional circumstances, an appointed attorney may request payment at a rate above the rates specified in 1 and 2 above, subject to review and approval by the judge presiding over the case."
Bandera, Gillespie, Kendall, and Kerr	No	boilerplate	boilerplate
Bastrop, Burleson, Lee, and Washington	No	boilerplate	none
Baylor, Cottle, King, and Knox	No	boilerplate	boilerplate

Bee, Live Oak, and McMullen	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	boilerplate	Total compensation per day shall not exceed $500, unless the court finds exceptional circumstances or that good cause exists for exceeding said total amount.
Bell	Yes	boilerplate plus "In exceptional circumstances and for good cause shown, an attorney may request payment at a rate in excess of the rates specified above. Payment in excess of the fee schedule herein shall be in the sole discretion of the trial court hearing the case."	boilerplate plus "In exceptional circumstances and for good cause shown, an attorney may request payment at a rate in excess of the rates specified above. Payment in excess of the fee schedule herein shall be in the sole discretion of the trial court hearing the case."
Bexar	No	If the judge disapproves the requested amount of payment, the judge shall make written findings stating the amount of payment that the judge approves and each reason for approving an amount different from the requested amount.	Requests for prior approval to exceed the maximum stated out-of-court hours and/or the maximum stated investigator fees must be filed in the appropriate court and set out the need to exceed the maximum and a justification of the cost. Extraordinary circumstances must be presented in order to obtain Court approval.
Blanco, Burnet, Llano, and San Saba	Yes	Boilerplate	Fee voucher form includes this language: "If requesting an amount in excess of the standard amount, attach a written explanation & justification"

Borden and Scurry	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	boilerplate	"Total compensation for all pre-trial, trial, post-trial, and appellate court appointed counsel services shall not exceed the following, unless the Court finds exceptional circumstances or that good cause for exceeding said total amount exists"
Bosque, Comanche, and Hamilton	Yes	"Compensation for court appointed counsel services will be as follows, except upon submission of an itemized voucher and a finding of good cause as hereinafter provided." "This method of computing payment for services is only to be used for complex cases or other circumstances making payment under the fixed rate grossly inadequate. To be compensated under this method the lawyer shall keep an accurate and detailed account of time expended, services rendered and dates involved and shall furnish documentation thereof to substantiate the reasonableness and necessity of the services rendered and time spent. An award under this method will be within the discretion of the Court. If the judge disapproves a request for compensation, the judge shall make written findings, stating the amount of payment that the judge approves and each reason for approving an amount different from the requested amount."	same
Bowie	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	boilerplate	"Total compensation for appointed counsel services in the below listed misdemeanor, felony, and juvenile cases shall not exceed the following, unless the Court finds exceptional circumstances or that good cause for exceeding said total amount exists."

Brazoria	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	boilerplate	"In the event an attorney presents a voucher for more than the presumptive maximum, said attorney will be responsible for providing an explanation to the Court to which the voucher is presented before same will be approved."
Brazos	Yes, but only in very specific circumstances (services not on fee vouchers and multiple charges)	"In determining the amount of compensation for disposition of multiple cases involving a single defendant, the court may award an amount greater than the established fixed fee." "Services not specifically described above (e.g., bond reductions, pre-filing dismissals, defense of motions to deny bail or revoke bond, dismissals, habeas corpus, etc.) will be paid on a rate basis using a daily or hourly rate most appropriate to the circumstances. Any request for compensation on a rate basis must be accompanied by an itemized statement showing the amount of time actually expended by the attorney on the case."	none
Brewster, Culberson, Hudspeth, Jeff Davis, and Presidio	No	boilerplate	boilerplate
Briscoe, Dickens, Floyd, and Motley	Yes	boilerplate	"The judge may, in his discretion, adjust the compensation to be paid to court appointed counsel if he believes, upon review of the Application of Compensation, overpayment has been requested due to an excessive amount of hours being entered on said application. In exceptional circumstances, the judge may deviate from the above numerations."

Brooks and Jim Wells	Yes	boilerplate	In the event of exceptional circumstances, the Court may allow a fee in excess of the above stated Flat Fee amounts. However, the attorney must provide a detailed, itemized statement (as to date, time expended and service rendered) to justify a variance from the Flat Fee Schedule.
Brown and Mills	Yes	boilerplate	"Except under unusual circumstances where the flat rate fee would be manifestly inappropriate because of circumstances beyond the control of appointed counsel, or the complexity of the case/legal issues, compensation for court appointed counsel in felony cases shall be as follows." "In exceptional circumstances and for good cause shown, an attorney may request payment at a rate in excess of the rates specified above. Payment in excess of the fee schedule herein shall be in the sole discretion of the trial court hearing the case."
Burleson	No	See Bastrop	
Burnet	Yes	See Blanco	
Caldwell	Yes	none, see fee schedule	"These fees are subject to equitable justification in discretion of the Court in extraordinary circumstances."
Calhoun, DeWitt, Goliad, Jackson, Reguio, and Victoria	Yes	boilerplate	"An attorney will be paid at a rate of $60 per hour unless there is a written approval/order from the Judge presiding over the case." "The attorney may request review of the fixed fee amount if the attorney deems said amount is insufficient based upon the complexity of a particular appeal."

Callahan, Coleman, and Taylor	Yes	boilerplate	"Other representation, at Judge's discretion." "Judge may deviate from above schedule in Judge's discretion."
Cameron	No	boilerplate	Unknown, fee schedule references guidelines that are not attached.
Camp	Yes	boilerplate	Total compensation for appointed counsel services in the below listed misdemeanor, felony, and juvenile cases shall not exceed the following, unless the Court, in its discretion, deems it just and necessary to award a greater sum than the following deemed minimums:
Carson, Childress, Collingsworth, Donley, and Hall	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	boilerplate	Total compensation for all pre-trial, post-trial, and appellate court appointed counsel services shall not exceed the following, unless the Court finds exceptional circumstances or that good cause for exceeding said total amounts exists
Cass	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	boilerplate	Total compensation for appointed counsel services in the below listed misdemeanor, felony, and juvenile cases shall not exceed the following, unless the Court finds exceptional circumstances or that good cause for exceeding said total amount exists
Castro	No	boilerplate	none
Chambers	No	boilerplate	none
Cherokee	Yes	boilerplate	The approving Court may vary from any guideline or limit set for the herein upon good cause shown and found by the Court

Childress	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	See Carson	
Clay	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	boilerplate	Total compensation for all pre-trial, post-trial, and appellate court appointed counsel services shall not exceed the following, unless the Court finds exceptional circumstances or that good cause for exceeding said total amounts exists
Cochran and Hockley	Yes	boilerplate	For good cause or exceptional circumstances, such as Capital cases, an appointed attorney may request payment at an hourly rate above the rate specified in subsection(b) of this Rule, subject to review and approval by the judge presiding over the case as specified in Rule 8.02.
Coke, Concho, Irion, Runnels, Schleicher, Sterling, and Tom Green	Yes	none	In the interest of justice, for just cause, or in exceptional cases, the Court in its discretion may approve fees that differ from this schedule.
Coleman	Yes	See Callahan	
Collin	No	none	none
Collingsworth	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	See Carson	

Colorado	No	boilerplate	none
Comal	Yes	none	These fees are subject to equitable justification in discretion of the Court in extraordinary circumstances
Comanche	Yes	See Bosque	
Concho	Yes	See Coke	
Cooke	No	boilerplate	none
Coryell	No	boilerplate	none
Cottle	No	See Baylor	
Crane	Yes	none	The Court may deviate from this schedule for good cause.
Crockett, Reagan, Sutton, and Upton	No	boilerplate	none
Crosby	No	boilerplate	none
Culberson	No	See Brewster	
Dallam	No	boilerplate	none
Dallas	Yes	boilerplate	"All fees are to be awarded at the discretion of the judge based upon the complexity of the case and work completed by the attorney"- unclear if this just speaks to the ability to deny an unreasonable line item or to alter the pay rate
Dawson, Gaines, Garza, and Lynn	No	boilerplate	none
De Witt	Yes	See Calhoun	

Deaf Smith and Oldham	No	The court may enter an order to compensate the attorney based upon the fee schedule described above.	None
Delta	Yes	Due to the wide variety of circumstances that may be encountered in cases, total compensation for all pre-trial, trial, post-trial, and appellate court appointed counsel services shall be determined by the judge upon the circumstances and complexity of each case. The fees set out below may be adjusted as reasonably determined by the judge.	none
Denton	Yes	Upon good cause shown, the Court may approve an amount for attorney fees which exceeds the amounts stated above. In making its determination, the Court may consider the time and labor required the complexity of the case, and the experience and ability of appointed counsel.	Upon good cause shown, the Court may approve an amount for attorney fees which exceeds the amounts stated above. In making its determination, the Court may consider the time and labor required the complexity of the case, and the experience and ability of appointed counsel.
Dickens	Yes	See Briscoe	
Dimmit, Maverick, and Zavala	Yes	For good cause or exceptional circumstances, an appointed attorney may request payment at an hourly rate above the rates specified in subsections (a) and (b) of this Rule, subject to review and approval by the judge presiding over the case as specified in Rule 8.02.	In an unusual case, the consideration set forth in Texas Rules of Professional Conduct Rule 1.04(b) may dictate a fee that is less than or more than the one established by these guidelines.
Donley	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	See Carson	

Duval, Jim Hogg, and Starr	Yes	boilerplate	Upon written motion setting forth good cause, the Court may vary from the foregoing schedule to fairly compensate counsel in a particular case.
Eastland	Yes	boilerplate	The Court reserves the right in all cases to modify this fee schedule based on the nature and complexity of a given case and the number of hours of professional time reasonably necessary to accomplish the services actually rendered.
Ector	No	boilerplate	none
Edwards, Kimble, McCulloch, Mason, and Menard	Yes	boilerplate	Compensation for time spent by counsel for in court and out of court shall be not less than SEVENTY DOLLARS AND NO CENTS ($70.00) per hour
El Paso	Yes	If the trial Judge disapproves the requested amount of payment, the judge shall make written findings stating the amount of payment that the judge approves and each reason for approving an amount different from the requested amount.	Fee schedule has maximum rates. "An attorney may obtain excess payment by certifying to the trial court that (1) the case was extended, complex, or both and (2) excess payment is necessary to provide fair compensation. ... If th etrial court grants the excess payment, the Local Administrative Judge, or one other judge of the same level as the trial court, must also approve the excess payment."

Ellis	Yes	The Court reserves the right in all cases to modify the fee requested based on the nature or complexity of a given case and the number of hours of professional time reasonably necessary to accomplish the services actually rendered in the context of the ability of an average competent attorney with average experience.	It is Ordered that compensation of court appointed counsel and related expenses made pursuant to a form prescribed by the appointing courts, shall be on a case by case basis as determined by the Judge. Compensation for court appointed counsel services shall not exceed the following, unless the Court finds exceptional circumstances or that good cause for exceeding said total amount exists
Erath	Yes	boilerplate	The Court reserves the right in all cases to modify this fee schedule based on the nature or complexity of a given case and the number of hours of professional time reasonably necessary to accomplish the services actually rendered.
Falls and Robertson	Yes	boilerplate	Compensation for non-capital felony appeals shall not be less than FIFE HUNDRED DOLLARS ($500.00) nor more than TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00) unless the Court finds exceptional circumstances for exceeding said amount.
Fannin	No	boilerplate	none
Fayette	No	boilerplate	none
Fisher, Mitchell, and Nolan	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	boilerplate	As elsewhere, attorneys can choose between flat fee or hourly, but it's unclear whether judges have discretion over the hourly rate
Floyd	Yes	See Briscoe	

Foard, Hardeman, and Wilbarger	No	boilerplate	none
Fort Bend	Yes	boilerplate	THE COURT MAY APPROVE ADDITIONAL EXPENDITURES UPON GOOD CAUSE SHOWN AND RESERVES THE DISCRETION TO DEVIATE UPWARD OR DOWNWARD IN AWARDING AN ATTORNEY FEE (WHETHER BY THE HOUR OR BY THE TOTAL AWARDED FEE) DEPENDING ON THE TIME AND LABOR REQUIRED THE COMPLEXITY OF THE CASE. AND THE EXPERIENCE AND ABILITY OF THE APPOINTED COUNSEL
Franklin	Yes	Due to the wide variety of circumstances that may be encountered in cases, total compensation for all pre-trial, trial, post-trial, and appellate court appointed counsel services shall be determined by the judge upon the circumstances and complexity of each case. The fees set out below may be adjusted as reasonably determined by the judge.	none
Freestone	Yes	boilerplate	Fees shall be paid according to the schedule listed hereafter unless exceptional circumstances are proven and approved by the trial judge in writing.
Frio	Yes	see Atascosa	
Gaines	No	See Dawson	

Galveston	Yes, buy only for capital murder cases	boilerplate	Capital Murder: Representation of defendant during trail before a jury on issue of guilt/innocence or punishment is paid at a rate set at the discretion of the trail court, but not less than $100 per hour.
Garza	No	See Dawson	
Gillespie	No	See Bandera	
Glasscock, Howard, and Martin	Yes	boilerplate	For good cause shown and upon prior approval of the Court, counsel may make application for payment for services and expenses in excess of the standards promulgated herein as the interests of justice and the circumstances of the particular case require.
Goliad	Yes	See Calhoun	
Gonzales	No	boilerplate	Large state range in fee schedule, but no language about deviating from it
Gray	Yes	boilerplate	Maximum hourly rate, except for unusual cases or appeals, with advance approval of estimated fee by the Presiding Judge, $100.00 per hour with maximum daily rate of $750.00.
Grayson	No	boilerplate	none
Gregg	Yes	boilerplate	This schedule shall be followed in all cases, except when the judge determines that the charges are excessive or, at their discretion, payment should be awarded at an increased rate due to the nature of the case.

Grimes	Yes	The guidelines may be modified by the Court as required by the circumstances and facts of each case.	Each judge reserves the right to deviate from these guidelines in particular cases where the amount or quality or work performed is substantially above or below the norm.
Guadalupe	No	boilerplate	none
Hale	No	boilerplate	Only for capital, and not very explicit
Hall	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	See Carson	
Hamilton	Yes	See Bosque	
Hansford	No	boilerplate	none
Hardeman	No	See Foard	
Hardin	No	boilerplate	none
Harris	No	boilerplate	none
Harrison	No	none	none
Hartley	No	boilerplate	none
Haskell, Kent, Stonewall, and Throckmorton	Yes	Total compensation for pre-trial, trial, post-trial, and appellate Court services by appointed counsel, shall not exceed the preceding amounts unless the Court finds exceptional circumstances or good cause for exceeding said amount.	same
Hays	No	boilerplate	none
Hemphill, Lipscomb, Roberts, and Wheeler	Yes	boilerplate	Maximum hourly rate, except for unusual cases or appeals, with advance approval of estimated fee by the Presiding Judge, $100.00 per hour with maximum daily rate of $750.00.

Henderson	No	boilerplate	none
Hidalgo	Yes	For good cause or exceptional circumstances, an appointed attorney may request payment at an hourly rate above the rates specified in subsections (a) and (b) of this Rule, subject to review and approval by the judge presiding over the case as specified in Rule 8.02.	For good cause or exceptional circumstances, an appointed attorney may request payment at an hourly rate above the rates specified in subsections (a) and (b) of this Rule, subject to review and approval by the judge presiding over the case as specified in Rule 8.02.
Hill	Yes	Lots of language like "a reasonable fee, but in no event less than $XX"	Same
Hockley	Yes	See Cochran	
Hood	Yes	The Court reserves the right in all cases to modify this fee schedule based on the nature or complexity of a given case and the number of hours of professional time reasonably necessary to accomplish the services actually rendered.	none
Hopkins	Yes	Due to the wide variety of circumstances that may be encountered in cases, total compensation for all pre-trial, trial, post-trial, and appellate court appointed counsel services shall be determined by the judge upon the circumstances and complexity of each case. The fees set out below may be adjusted as reasonably determined by the judge.	none
Houston	Yes	boilerplate	Fees shall be paid according to the schedule listed hereafter unless exceptional circumstances are proven and approved by the trial judge in writing.
Howard	Yes	See Glasscock	
Hudspeth	Yes	See Brewster	
Hunt	No	none	none
Hutchinson	No	boilerplate	none

Irion	Yes	See Coke	
Jack and Wise	Yes	boilerplate	For good cause or exceptional circumstances, an appointed attorney may request payment at an hourly rate above the rates specified herein, subject to review and approval by the judge presiding over the case; and
Jackson	Yes	See Calhoun	
Jasper, Newton, Sabine, and San Augustine	Yes	boilerplate	Fees shall be paid according to the schedule listed hereafter except in circumstances shown to and approved by the trial judge. Payment may then be adjusted up or down to meet these circumstances.
Jeff Davis	Yes	See Brewster	
Jefferson	No	boilerplate	none
Jim Hogg	Yes	See Duval	
Jim Wells	Yes	See Brooks	
Johnson	Yes	boilerplate	Total compensation for all pretrial, trial, post-trial, and appellate court appointed counsel services shall not exceed the following, unless the Court finds exceptional circumstances or that good cause for exceeding said total amount exists
Jones and Shackelford	Yes	boilerplate	JUDGE'S DISCRETION FOR FEES NOT LISTED ABOVE. Judge may deviate from above schedule at judge's discretion.
Karnes	Yes	See Atascosa	
Kaufman	No	boilerplate	none

Kendall	No	See Bandera	
Kenedy and Kleberg	Yes	A court may vary from the foregoing schedule to fairly compensate counsel in a particular case.	none
Kent	Yes	See Haskell	
Kerr	No	See Bandera	
Kimble	Yes	See Edwards	
King	No	See Baylor	
Kinney	Yes	boilerplate	Each judge of their respective court reserves the right to deviate from these guidelines in particular cases where the amount or quality of work performed is substantially above or below the norm.
Kleberg	Yes	See Kenedy	
Knox	No	See Baylor	
La Salle	Yes	See Atascosa	
Lamar	Yes	For all other fees for appointed counsel for procedures not mentioned above (as, for example, a writ of mandamus or for reasonable compensation where the attorney is removed in favor of an earlier appointed counsel for representation of a defendant who has multiple cases), the court shall set a fee based upon the complexity and seriousness of the procedure of not less than $25.00 per hour nor more than $100.00 per hour in the sole discretion of the trial judge.	The Judge of the trial court shall award trial fees based upon personal knowledge and experience for the preparation and time in court, complexity of the trial and post-trial proceedings.
Lamb	Yes	boilerplate	Judges may vary from the standard fee if in that Judge's opinion the variance is warranted.

Lampasas	Yes	boilerplate	For good cause or exceptional circumstances, an appointed attorney may request payment at an hourly rate above the rates specified in subsection (a) and (b) of this Rule, subject to review and approval by the Judge presiding over the case as specified in Rule 8.02.
Lavaca	No	boilerplate	none
Lee	No	See Bastrop	
Leon	No	boilerplate	none
Liberty	No	boilerplate	none
Limestone	Yes	boilerplate	Fees shall be paid according to the schedule listed hereafter unless exceptional circumstances are proven and approved by the trial judge in writing.
Lipscomb	Yes	See Hemphill	
Live Oak	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	See Bee	
Llano	Yes	See Blanco	

Loving, Reeves, and Ward	Yes	boilerplate	In each case where compensation is sought in excess of the minimum amounts provided above, and in all cases of appeal, and in connection with each request for the approval of expenses for investigation and expert testimony, the court shall take into account the time and labor required, the complexity of the case, and the experience and ability of the appointed attorney. The Court shall determine in its discretion the reasonableness and necessity of the time claimed in each request for payment. In considering the above factors and the time claimed in each case, the Court shall pay for each hour determined reasonable and necessary, a rate between $110 and $175
Lubbock	No	boilerplate	bottom of fee schedule says "Min 5.8 hrs for Special." Unclear what that means
Lynn	No	See Dawson	
Madison and Walker	Yes	The courts reserve the right to vary the guidelines in complex cases.	Each judge reseryes the right to deviate from these guidelines in particular cases where the amount or quality of work performed is substantially above or below the norm
Marion	Yes	boilerplate	Total compensation for appointed counsel services in the below listed misdemeanor, felony, and juvenile cases shall not exceed the following, unless the Court finds exceptional circumstances or that good cause for exceeding said total amount exists
Martin	Yes	See Glasscock	

Mason	Yes	See Edwards	
Matagorda	No	boilerplate	none
Maverick	Yes	See Dimmit	
McCulloch	Yes	See Edwards	
McLennan	Yes	No provision of this plan may be construed to divest any individual Judge of the ability to take any action the Judge believes is immediately necessary in the interest of justice, to protect the rights of the accused, or to protect the public.	none
McMullen	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	See Bee	
Medina	Yes	boilerplate	The court may make exception to the above rates upon a showing that the rate would be unfair in a given case.
Menard	Yes	See Edwards	
Midland	No	none	boilerplate
Milam	Yes	boilerplate	Any departure from the fee structure provided herein requires pre-approval from the Court
Mills	Yes	See Brown	

Mitchell	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	See Fisher	
Montague	Yes	Total compensation for all pre-trial, trial, post-trial, and appellate court appointed counsel services shall not exceed the following, unless the Court finds exceptional circumstances or that good cause for exceeding said total amount exists	same
Montgomery	No	boilerplate	none
Moore	No	boilerplate	none
Morris	Yes	boilerplate	Total compensation for appointed counsel services in the below listed misdemeanor, felony, and juvenile cases shall not exceed the following, unless the Court finds exceptional circumstances or that good cause for exceeding said total amount exists
Motley	Yes	See Briscoe	
Nacogdoches	Yes	boilerplate	Attorneys fees shall be paid according to the schedule listed hereafter except in exceptional circumstances shown to and approved by the trial judge. Payment may then be adjusted up or down to meet these circumstances.
Navarro	Yes	boilerplate	In order to compensate for additional time spent on criminal, juvenile, and CPS cases, the Court will consider additional compensation when accompanied by an itemized statement
Newton	Yes	See Jasper	

Nolan	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	See Fisher	
Nueces	Yes	A court may vary from the foregoing schedule to fairly compensate counsel in a particular case.	same
Ochiltree	No	boilerplate	none
Oldham	No	See Deaf Smith	
Orange	No	none	none
Palo Pinto	Yes	The Court reserves the right in all cases to modify this fee schedule based on the nature or complexity of a given case and the number of hours of professional time reasonable necessary to accomplish the services actually rendered.	
Panola	No	boilerplate	none
Parker	Yes, but only for capital murder cases	boilerplate	Total compensation for pre-trial, trial and post-trial services in a capital (death penalty sought) jury trial shall not exceed FIFTY THOUSAND DOLLARS ($50,000.00) without a court finding that good cause exists. Said fees shall not exceed TWO THOUSAND DOLLARS ($2,000.00) in total investigator fees and TWO THOUSAND DOLLARS ($2,000.00) in total expert fees unless the Court finds exceptional circumstances or that good cause exists for exceeding said total amount.
Parmer	Yes	See Bailey	

Pecos	Yes, but only for appellate briefs	boilerplate	Appellate briefs: set by court commensurate with time and complexity
Polk, San Jacinto, and Trinity	No	boilerplate	none
Potter	No	See Armstrong	
Presidio	Yes	See Brewster	
Rains	Yes	Due to the wide variety of circumstances that may be encountered in cases, total compensation for all pre-trial, trial, post-trial, and appellate court appointed counsel services shall be determined by the judge upon the circumstances and complexity of each case. The fees set out below may be adjusted as reasonably determined by the judge.	none
Randall	No	See Armstrong	
Reagan	No	See Crockett	
Real	Yes	boilerplate	Hourly fees for the preparation for and trial of a case must be reasonable in light of the complexity of the case (or cases), and the experience and ability of counsel. The court may make exception to the above rates upon a showing that the rate would be unfair in a given case.
Red River	Yes	boilerplate	There are stated ranges, but also language that says "to be set at the sole discretion of the trial judge based upon the complexity and seriousness of the criminal or juvenile charges." and "The Judge of the trial court shall award trial fees based upon personal knowledge of the time in court and complexity of the trial and post-trial proceedings."
Reeves	Yes	See Loving	
Refugio	Yes	See Calhoun	

Roberts	Yes	See Hemphill	
Robertson	Yes	See Falls	
Rockwall	Yes	Payments will not vary from the fee schedule except in extraordinary circumstances where the fee is shown to be manifestly inappropriate. Approval of variance will require counsel to file and present a motion with the Court which documents in detail the extraordinary circumstances.	none
Runnels	Yes	See Coke	
Rusk	No	boilerplate	same
Sabine	Yes	See Jasper	
San Augustine	Yes	See Jasper	
San Jacinto	No	See Polk	
San Patricio	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	See Aransas	
San Saba	Yes	See Blanco	
Schleicher	Yes	See Coke	
Scurry	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	See Borden	
Shackelford	yes	See Jones	
Shelby	No	boilerplate	none

Sherman	No	boilerplate	none
Smith	Yes	The Criminal Courts Board retains authority by majority vote to waive any portion of this plan in exceptionally justified cases or when determined necessary for the fair and impartial administration of justice.	While the courts set the caps at this level for initial expenditures, the courts may increase the allowable amount upon further justification.
Somervell	Yes; total payment cap may be exceeded, but it's unclear if the discretion is for the hourly rate or the total hours	boilerplate	Total compensation for all pretrial, trial, post-trial, and appellate court appointed counsel services shall not exceed the following, unless the Court finds exceptional circumstances or that good cause for exceeding said total amount exists
Starr	Yes	See Duval	
Stephens	Yes	boilerplate	Fee rates will be approved on a case by case basis, depending upon the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel.
Sterling	Yes	See Coke	
Stonewall	Yes	See Haskell	
Sutton	No	See Crockett	
Swisher	No	boilerplate	none
Tarrant	Yes	Payment can 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.	n/a
Taylor	Yes	See Callahan	

Terrell	Yes	boilerplate	Each judge of their respective court reserves the right to deviate from these guidelines in particular cases where the amount or quality of work performed is substantially above or below the norm.
Terry	Yes	The judge may make payment in an amount different than that shown below for good cause.	none
Throckmorton	Yes	See Haskell	
Titus	Yes	boilerplate	Total compensation for appointed counsel services in the below listed misdemeanor, felony, and juvenile cases shall not exceed the following, unless the Court, in its discretion, deems it just and necessary to award a greater sum than the following deemed
Tom Green	Yes	See Coke	
Travis	No, but program administrator may have discretion	none, see fee schedule	"Appointed counsel will be compensated for time actually required by an appointment at an hourly rate of $70 to $100 for in-court time and $60 to $90 for out-of-court time. The exact rate will be dependent upon the complexity of the case and the experience and ability of the appointed counsel." "In an unusual case, taking into account the considerations set forth in Texas Rules of Professional Conduct Rule 1.04(b) the Program Administrator may authorize a fee that is less than or more than the one established by these guidelines."

Trinity	No	See Polk	
Tyler	Yes	boilerplate	It is further ORDERED that total compensation for appointed counsel services and expenses shall not exceed the following, unless the Court finds exceptional circumstances or that good cause for exceeding said total amount exists
Upshur	Yes	boilerplate	It is further ORDERED that total compensation for appointed counsel services and expenses shall not exceed the following, unless the Court finds exceptional circumstances or that good cause for exceeding said total amount exists
Upton	No	See Crockett	
Uvalde	Yes	boilerplate	The court may make exception to the above rates upon a showing that the rate would be unfair in a given case.
Val Verde	Yes	boilerplate	Each judge of their respective court reserves the right to deviate from these guidelines in particular cases where the amount or quality of work performed is substantially above or below the norm.
Van Zandt	No	boilerplate	none
Victoria	Yes	See Calhoun	
Walker	Yes	See Madison	
Waller	No	none	none
Ward	Yes	See Loving	
Washington	No	See Bastrop	

Webb	Yes	If the trial court diverts from the fee schedule and an amount exceeds the amount listed in the fee schedule, the Local Administrative Judge (in felony cases) or two County Court at Law Judges (in misdemeanor cases) or two of the juvenile judges must also approve the excess payments. In order to approve excess payments, the trial court must make the following findings:	none
Wharton	No	boilerplate	none
Wheeler	Yes	See Hemphill	
Wichita	Yes	boilerplate	Compensation for court-appointed counsel will be approved on a case by case basis, depending upon the time and labor required, the complexity of the case and the experience and ability of the appointed counsel.
Wilbarger	No	See Foard	
Willacy	No	boilerplate	Request for prior approval to exceed the maximum stated out-of-court hours and/or the maximum stated investigator fees must be filed in the appropriate court and set out the need to exceed the maximum and a justification of the cost. Extraordinary circumstances must be presented in order to obtain Court approval.
Williamson	Yes	boilerplate	"Except for good cause shown, court-appointed attorney fees will be as follows"
Wilson	Yes	See Atascosa	

Winkler	Yes	boilerplate	The Court may deviate from this schedule for good cause.
Wise	Yes	See Jack	
Wood	Yes	boilerplate	The Court may adjust fees upward for extraordinary circumstances
Yoakum	Yes	The court may enter an order to compensate the attorney based upon the fee schedule described above.	Voucher has a "reasons for denial or variation"
Young	No	boilerplate	none
Zapata	No	boilerplate	none
Zavala	Yes	See Dimmit	

TAB 5

Pay Defeat For Paxton Prosecutors Puts Texas Judges In Bind

By Jess Krochtengel
Law360, Dallas (August 23, 2017, 9:29 PM EDT) -- Texas judges may face steep challenges in finding qualified attorneys to serve as special prosecutors in high-profile cases after a state appellate court voided a $300 hourly fee agreement for the lawyers appointed to investigate securities fraud allegations against Texas Attorney General Ken Paxton, experts say.

In the Paxton case, the district attorney who would ordinarily have pursued the investigation and any prosecution recused himself because of a prior business relationship and friendship with the AG. A trio of special prosecutors was appointed, with the court agreeing to pay each of them $300 an hour, a discount from their private-practice rates. But on Monday, the Fifth Court of Appeals in Dallas said that fee agreement violates state law and can't be enforced.

The court said special prosecutors must be paid in line with fee schedules intended for the lawyers appointed to serve indigent clients, which vary by county and can be fixed at just a few thousand dollars per case. At what are effectively pro bono rates, it's a tough sell for a highly skilled attorney to take on a challenging investigation and hotly contested trial like the Paxton case, experts say.

"It does create a dilemma," said Mark Jones, a political science professor at Rice University. "If a DA recuses themself, it limits the options for judges to go to bring in a special prosecutor. The judges are going to have a very difficult time getting someone to come in for fees far below their hourly rates."

Jones said the cap on fees will make it harder to get high-quality prosecutors, and that the biggest effect of the decision will be reducing the quality of the overall prosecution.

"It shifts the advantage substantially to the defendant," Jones said. "Assuming they have resources, the more they can drag out the process, the lower the de facto hourly rate for the prosecutors."

In Texas, appointed special prosecutors are entitled to the same pay as an attorney appointed to represent an indigent person, according to fee schedules set at the local level. A Fifth Court of Appeals panel on Monday invalidated a Collin County local rule that allowed criminal court judges to pay attorneys more than the fixed fees in "unusual circumstances," saying it thwarts the state's dual aims of paying appointed attorneys a fair but not excessive rate and letting counties accurately project their expenses.

The appellate court ordered the trial judge to vacate an order compelling Collin County to pay about $200,000 in legal bills to the Paxton special prosecutors, who in 2016 were paid about $255,000 for their work on the case. The prosecutors are expected to appeal the decision.

"The AG is a happy guy today," said Edward Mallett of Mallett & Saper Attorneys and Counselors LLP, a former president of the Texas Criminal Defense Lawyers Association. "The prosecutors assigned to prosecute him have been dealt a crippling blow."

Mallett, who said he is friends with two of the special prosecutors in the Paxton case but has not talked with them about the opinion, said maintaining a small law practice is expensive. Overhead costs such as office rent and equipment, state and national bar dues, and staff and training can eat up half a lawyer's gross income before taxes take another large chunk — and only then do those billings equate to take-home pay.

Mallett said a $300 hourly rate is probably about half the ordinary billing rate for private-practice lawyers of the special prosecutors' caliber. To expect them to work at even a $100 hourly rate would make it difficult to run their law practices, particularly given the significant time involved in the Paxton case that eats into their ordinary practices, he said.

"It's crazy to think highly skilled and experienced lawyers can prosecute or defend a major case on that budget," Mallett said.

Judges do have some other options than looking to private-practice attorneys to step into the shoes of a prosecutor. Sometimes judges appoint district attorneys from neighboring jurisdictions to step in when a particular DA recuses his office from handling a case. The Texas Attorney General's Office has also been called in to prosecute cases after a DA's recusal.

But Mallett said that as a general rule, elected DAs take the position that they have more than enough work on their plates prosecuting crime in their own counties. They may also not want to foot the bill for a lengthy, complex investigation.

"They're not looking to go next door and do the work of some guy that's elected in the next county," Mallett said.

State law requires judges who oversee criminal cases in each county to adopt a formal fee schedule setting out compensation for appointed attorneys.

District courts, county courts-at-law and juvenile board attorneys can have different fee ranges. In general, most counties use a combination of a modest flat fee, an hourly rate of up to a maximum of $150, and a day rate for trials, with amounts dependent on the type of case.

As the Fifth Court of Appeals noted, many counties across the state also have a provision in their fee schedules like Collin County did, allowing for a deviation from those flat rates in unusual circumstances.

It's possible — but unlikely — that criminal court judges will revisit their fee schedules in light of the Paxton prosecution because of the political scrutiny they could be under if they propose raising appointed attorney fees, Jones said.

"Any time you're dealing with elected officials, no one wants to be the person pushing for something that seems excessive to the average taxpayer," Jones said. "And the average taxpayer does not make $300 an hour."

Jones said anyone pushing for higher fees for special prosecutors would be "hand-delivering a ready-made attack ad" to their opponent in the next election.

Cal Jillson, a political science professor at Southern Methodist University, said the fee schedules are intended for run-of-the-mill criminal cases, not particularly complex or high-profile cases in which senior figures like the state's sitting attorney general are the defendant.

"It does suggest that the system is not effectively set up to deal with the high-profile, complicated cases that do occasionally occur," Jillson said. "I think that's particularly the case when you have a high-profile, well-connected individual like the attorney general, who for ideological and political reasons is supported by very wealthy people who can take upon themselves the goal of supporting him and disrupting the trial."

Jillson said despite the potential flaw in the system, he doesn't expect to see a "wave of adjustments" to local fee schedules in light of the Paxton case.

"Most elected officials at the municipal and county level look at Ken Paxton and say, 'There but for the grace of God go I. I don't want to make it easier for me to be prosecuted effectively, so I don't want to change the rate,'" he said.

Jillson said it's similar to the reason it's historically been difficult to enact ethics reforms at the state and local levels in Texas — elected officials don't want to make it easier to bring ethics investigations or criminal investigations against themselves or people in similar situations.

"It probably is something that needs to be dealt with at the state level," Jones said.

But because many of the recent notable cases involving special prosecutors have targeted Republican officeholders, there's probably no interest among the Republican state leadership to increase the funding for lawyers. There are no political points to be won by providing a $300 hourly rate for attorneys, he said.

On top of that, the state legislature just ended its 2017 session, meaning the next chance for this issue to be addressed at the state level won't come until 2019.

"What it probably would mean is that if this does become the law of the land, you're going to be looking at special prosecutors who approach the position more as a pro bono affair," Jones said.

The Collin County commissioners are represented by Clyde M. Siebman and Bryan H. Burg of Siebman Burg Phillips & Smith LLP.

The prosecutors are Kent Schaffer, Brian Wice and Nicole DeBorde.

Paxton is represented by Philip Hilder, Tate Williams and Paul Creech of Hilder & Associates PC, Dan Cogdell of Cogdell Law Firm, Heather Barbieri of Barbieri Law Firm PC,

TAB 6

NO. 416-81913-2015
NO. 416-82148-2015
NO. 416-82149-2015

THE STATE OF TEXAS	)(	IN THE DISTRICT COURT
	)(	
VS,	)(	COLLIN COUNTY, TEXAS
	)(	
WARREN KENNETH PAXTON, JR.	)(	416TH JUDICIAL DISTRICT

ORDER ON PAYMENT OF ATTORNEY'S FEES TO ATTORNEYS PRO TEM

The Attorneys Pro Tem in the above styled and numbered causes have submitted request for payment of interim attorneys fees and expenses incurred for their services. The Court finds that Article 2.07 (c) of the Code of Criminal Procedure mandates that Attorney Pro Tem(s) shall receive compensation in the same amount and manner as an attorney appointed to represent an indigent person. The Court further finds that Section 4.01(b) of the Local Rules to Implement the Fair Defense Act of Collin County, Texas, mandates that payment can 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.

It is, therefore, ORDERED, ADJUDGED AND DECREED that payment of attorneys fees to Attorneys Pro Tem in these causes shall deviate from the fee schedule and each attorney shall be paid the amount in the hourly rate ordered to be paid in the Appointed Counsel Request for Compensation as submitted by the respective Attorney Pro Tem and as approved by the Court..

It is ORDERED, ADJUDGED AND DECREED that Jeff May, Auditor of Collin County, Texas, shall present these claims for payment of services to the Commissioner's Court of Collin County, Texas in accordance with all applicable local rules of Collin County, Texas, and pursuant to the mandates as set out in Government Code, Chapter 2251. It is further ORDERED, JUDGED AND DECREED that these claims shall be paid within the time limits as required by Government Code, Chapter 2251.

This Order shall be enforceable by all sanctions available to the Court for noncompliance with the terms of this Order by any person or entity.

SIGNED this 6th day of January, 2016.

George Gallagher
JUDGE PRESIDING

TAB 7

NO. 416-81913-2015
NO. 416-82148-2015
NO. 416-82149-2015

THE STATE OF TEXAS	)(	IN THE DISTRICT COURT
	)(	
VS,	)(	COLLIN COUNTY, TEXAS
	)(	
WARREN KENNETH PAXTON, JR.	)(	416TH JUDICIAL DISTRICT

FILED
17 JAN -9 PM 12:16
LYNNE FINLEY
DISTRICT CLERK
COLLIN COUNTY, TX
BY _____ DEPUTY

SECOND ORDER ON PAYMENT OF ATTORNEY'S FEES TO ATTORNEYS PRO TEM

The Attorneys Pro Tern in the above styled and numbered causes have submitted request for payment of interim attorneys fees and expenses incurred for their services. The Court finds that Article 2.07 (c) of the Code of Criminal Procedure mandates that Attorney Pro Tem(s) shall receive compensation in the same amount and manner as an attorney appointed to represent an indigent person. The Court further finds that Section 4.01(b) of the Local Rules to Implement the Fair Defense Act of Collin County, Texas, mandates that payment can 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.

It is, therefore, ORDERED, ADJUDGED AND DECREED that payment of attorneys fees to Attorneys Pro Tern in these causes shall deviate from the fee schedule and each attorney shall be paid the amount in the hourly rate ordered to be paid in the Appointed Counsel Request for Compensation as submitted by the respective Attorney Pro Tern and as approved by the Court..

It is ORDERED, ADJUDGED AND DECREED that Jeff May, Auditor of Collin County, Texas, shall present these claims for payment of services to the Commissioner's Court of Collin County, Texas in accordance with all applicable local rules of Collin County, Texas, and pursuant to the mandates as set out in Government Code, Chapter 2251. It is further ORDERED, JUDGED AND DECREED that these claims shall be paid within the time limits as required by Government Code, Chapter 2251.

This Order shall be enforceable by all sanctions available to the Court for noncompliance with the terms of this Order by any person or entity.

SIGNED this 4th day of January, 2017.

George Gallagher

GEORGE GALLAGHER, JUDGE PRESIDING

TAB 8

"I have been advised this ___ day of ____, 2___, by the (name of court) Court of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel. (signature of defendant).

2. A defendant may withdraw a waiver of the right to counsel at any time but is not entitled to repeat a proceeding previously held or waived solely on the grounds of the subsequent appointment or retention of counsel. If the defendant withdraws a waiver, the trial court shall provide the appointed or retained counsel 10 days to prepare..

Attorney Selection Process

10/28/2015

1.02 Computerized Attorney Listing System

A. The District Judges direct that each appointing authority shall utilize the electronic appointment system and all appointments shall be made from the list as published within Collin County's Odyssey system. If the Odyssey system is unavailable, the appointing authority shall appoint an attorney from the written list of approved attorneys. The appointing authority shall select an attorney from among the list of the next five attorneys whose names are listed on the Odyssey system. If this procedure is not followed, the appointing authority must state in writing the good cause found for deviating from this requirement.

B. The computerized attorney listing system shall contain identifying information to indicate those attorneys who have been specially approved for appointment in cases involving mental illness or mental defect.

1.03 Admonishments Form

All magistrates shall use the approved Admonishment Form (Exhibit A) or a substantially similar form.

Fee and Expense Payment Process

10/28/2015

SECTION FOUR
PROCEDURES FOR ATTORNEY COMPENSATION

4.01. Attorney Fee Schedule

A. The District Judges adopt, pursuant to Article 26.05 Tex. Code of Crim. Proc., a fee schedule for appointed attorneys, attached hereto as "Fee Schedule for Appointed Attorneys."

B. Payment can 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.

4.02 Payment Request Form

In cases disposed of by a guilty plea or similar pre-trial disposition, Counsel shall submit their requests for payment on the auditor's approved Payment Request Form on the date of the disposition. If the case is disposed of by trial, the Payment Request Form shall be submitted within seven days of the date the trial is concluded. Payment requests not submitted within thirty days of the date of disposition shall not be approved by the Court, absent extenuating circumstances.

4.03 Investigation Expenses

A. Appointed counsel may file with the trial court a pretrial *ex parte* motion for advance payment of investigative and expert expenses. The request for expenses must state:

1. the type of investigation to be conducted or the type of expert to be retained;

2. specific facts that suggest the investigation will result in admissible evidence or that the services of an expert are reasonably necessary to assist in the preparation of a potential defense; and

3. an itemized list of anticipated expenses for each investigation or each expert.

B. The court shall grant the request for advance payment of expenses in whole or in part if the request is reasonable. If the court denies in whole or in part the request for expenses, the court shall:

1. state the reasons for the denial in writing;

2. attach the denial to the confidential request; and

3. submit the request and denial as a sealed exhibit to the record.

B. Appointed counsel may incur investigative or expert expenses without prior approval of the court. On presentation of a claim for reimbursement, the court shall order reimbursement of counsel for the expenses only if they are reasonably necessary and reasonably incurred. Unreasonable or unnecessary expenses will not be approved. See, Articles 26.05(d), 26.052(f), (g), & (h), Code of Criminal Procedure.

TAB 9

Miscellaneous

10/28/2015

SECTION FIVE

5.01 Amendments

This plan is subject to amendment.

5.01 Availability of Forms

Forms provided for in this plan are available on the county website.

5.03 Effective Date

This plan is effective on the 1st day of November, 2015, and shall remain in effect until further order of the District Judges trying criminal cases.

Fee Schedule For Indigent Defense Court Appointed Attorneys

In all felony cases, except as hereafter provided, counsel shall be paid according to the following fee schedule, without exception:

PLEAS:

Death Penalty:	$150.00 per hour
Capital, non-death penalty:	$100.00 per hour
First Degree Felony:	$1,000.00
Second Degree Felony:	$750.00
Third Degree & State Jail Felonies:	$500.00
Additional cases:	$250.00 (per case at discretion of the judge)

TRIALS:

Pre-Trial preparation:	$1,000.00

Trial, per ½ day: $500.00

APPEALS:

Appeal from trial: $3,500.00

Other appeal: $2,000.00

DISCRETIONARY ADJUSTMENT

Per case adjustment, not to exceed: $1,000.00

Child Advocacy Center cases and all cases with a minimum 15 year sentence:

Per case adjustment, not to exceed: $3,000.00

Cases involving serious mental illness, competency or mental defect under the direction of the mental health program managing attorney:

Per case adjustment, not to exceed: $1,750.00

Plan Documents

Collin District Court 2009 Federal Poverty Guideline Percentages.pdf (11/30/2009 2:44:15 PM) view
Collin District Court 2015 Federal Poverty Guidelines.xls (10/21/2015 11:11:56 AM) view
Collin District Court Affidavit of Indigence.doc (10/22/2013 4:11:30 PM) view
Collin District Court Attorney Annual Renewal Application for Appointment.pdf (10/21/2015 10:41:59 AM) view
Collin District Court Attorney Application for Appointment.docx (10/22/2013 4:12:14 PM) view
Collin District Court Attorney Application for MHMC Program Appointment.docx (10/25/2013 9:42:13 AM) view
Collin District Court Attorney Fee Schedule.docx (11/8/2013 11:42:19 AM) view
Collin District Court Attorney Fee Voucher.pdf (10/22/2013 4:12:56 PM) view
Collin District Court Collin District Court 2013 Federal Poverty Guidelines.docx (4/9/2013 2:22:07 PM) view
Collin District Court Contract amendment for Indigent Defense Services.pdf (10/21/2015 11:15:43 AM) view
Collin District Court Contracts for Indigent Defense Services.pdf (11/7/2013 12:27:01 PM) view
Collin District Court Local Rules To Implement The Fair Defense Act.pdf (12/8/2009 11:27:41 AM) view
Collin District Court Magistrate's Warning Form.doc (10/22/2013 4:03:45 PM) view
Collin District Court Managed Assigned Counsel Plan of Operation.docx (10/31/2013 7:52:21 AM) view
Collin District Court Waiver of Counsel.docx (10/23/2013 4:36:27 PM) view

SECTION FIVE

5.01 Amendments

This plan is subject to amendment.

5.02 Availability of Forms

Forms provided for in this plan will be available on the county website.

5.03 Effective Date

This plan is effective for all cases pending on or after the 22nd day of January, 2016, and shall remain in effect until further order of the district judges trying criminal cases.

Judge Angela Tucker
199th Judicial District Court

Judge Scott Becker
219th Judicial District Court

Judge John R. Roach, Jr.
296th Judicial District Court

Judge Ray Wheless
366th Judicial District Court

Judge Benjamin Smith
380th Judicial District Court

Judge Mark Ruesch
401st Judicial District Court

Judge Chris Oldner
416th Judicial District Court

TAB 10

Order entered January 30, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00093-CV

IN RE JEFFORY BLACKARD, Relator

Original Proceeding from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-00320-2017

ORDER

Before Justices Bridges, Fillmore, and Schenck

Before the Court is relator's January 30, 2017 Petition for Writ of Injunction and Emergency Motion for Temporary Relief. In the emergency motion, relator asks the Court to stay the Collin County Commissioners Court's consideration or approval of any payment of attorney's fees to the Attorneys Pro Tem appointed in *State of Texas v. Warren Kenneth Paxton, Jr.*, Case Nos. 416-81913-2015, 416-82148-2015, and 416-82149-2015, 416th Judicial District Court, Collin County, Texas (the *Paxton* cases) pending this Court's determination and resolution of relator's Petition for Writ of Injunction. According to relator, the Commissioners Court is scheduled to consider whether to approve the district court's Second Order on Payment of Attorney's Fees to Attorneys Pro Tem today, January 30, 2017, at 1:30 p.m. Relator argues that a temporary stay is necessary to preserve the Court's jurisdiction over this original proceeding and that a writ of injunction is necessary to preserve the Court's jurisdiction over

relator's underlying accelerated appeal, *Blackard v. Attorneys Pro Tem Kent A. Schaffer, et al.,* which relator states was perfected on January 27, 2017. Citing this Court's opinion in *Blackard v. Attorney Pro Tem Kent A. Shaffer, et al.,* No. 05-16-00408-CV, 2017 WL 343597 (Tex. App.—Dallas Jan. 18, 2017, no pet. h.), relator argues that his underlying accelerated appeal will become moot and this Court's jurisdiction over that appeal destroyed if the Commissioners Court considers, approves, and disburses the requested payment of attorney's fees.

This Court has jurisdiction to issue writs necessary to enforce the jurisdiction of the Court. TEX. GOV'T CODE ANN. § 22.221(a); TEX. R. APP. P. 52.10. We **GRANT** relator's request for temporary relief and **ORDER** the Collin County Commissioners Court to stay any consideration or approval of the payment or payments subject to the district court's Second Order on Payment of Attorney's Fees to Attorneys Pro Tem in the *Paxton* cases pending resolution of this original proceeding. This stay shall remain in effect until further order of the Court.

The Court further requests real parties in interest and respondent to file responses to the petition for writ of injunction, if any, on or before February 9, 2017.

/s/ ROBERT M. FILLMORE
JUSTICE

TAB 11

VACATE Order, DISMISS and REMAND; and Opinion Filed June 9, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00094-CV

JEFFORY BLACKARD, Appellant
V.
KENT A. SCHAFFER, IN HIS OFFICIAL CAPACITY, BRIAN W. WICE, IN HIS OFFICIAL CAPACITY, NICHOLE DEBORDE, IN HER OFFICIAL CAPACITY, COLLIN COUNTY JUDGE KEITH SELF, IN HIS OFFICIAL CAPACITY, COMMISSIONER SUSAN FLETCHER, IN HER OFFICIAL CAPACITY, COMMISSIONER CHERYL WILLIAMS, IN HER OFFICIAL CAPACITY, COMMISSIONER CHRIS HILL, IN HIS OFFICIAL CAPACITY, COMMISSIONER DUNCAN WEBB, IN HIS OFFICIAL CAPACITY, AND AUDITOR JEFF MAY, IN HIS OFFICIAL CAPACITY, Appellees

On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-00320-2017

MEMORANDUM OPINION

Before Justices Francis, Brown, and Schenck
Opinion by Justice Francis

We reinstate this appeal.

Jeffory Blackard brought this suit challenging the legality of an order rendered by the 416th Judicial District Court that directed payment of attorney's fees by the Auditor of Collin County, following presentment to and approval by the Collin County Commissioners Court, to the attorneys pro tem in *State of Texas v. Warren Kenneth Paxton, Jr.*, Case Nos. 416-81913-2015, 416-82148-2015, 416-82149-2015 (the *Paxton* cases). Blackard asserted standing to bring the challenge as a taxpayer seeking to enjoin the illegal expenditure of public funds and filed an

application for a temporary restraining order in the trial court below. The court denied the application for temporary restraining order concluding it had no jurisdiction to grant the relief requested. In its conclusions of law, the court stated the denial was "with prejudice to Mr. Blackard seeking the same relief *via* an injunctive action." The court did not, however, dismiss either Blackard's claims for injunctive relief or his claims for declaratory relief.

On January 30, 2017, Blackard filed this interlocutory appeal, a petition for writ of injunction, and an emergency motion for temporary relief. That same day, at Blackard's request, this Court issued an order staying the Collin County Commissioners Court from "any consideration or approval of the payment or payments subject to the district court's Second Order on Payment of Attorney's Fees to Attorneys Pro Tem." Blackard requested this stay as necessary to prevent his challenge to the payment of attorney's fees from becoming moot. *See Blackard v. Schaffer*, No. 05-16-00408-CV, 2017 WL 343597, *6 (Tex. App.—Dallas Jan. 8, 2017, pet. filed) (*Blackard I*) (concluding challenge to fee order moot after fees paid). On February 10, we consolidated appellant's request for a stay with this appeal and ordered the stay on the Commissioners Court remain in place. We further stayed "all efforts to enforce and/or execute on that order."

On May 17, we lifted the stays previously imposed for the purpose of allowing the Commissioners Court to consider and act on the Second Order on Payment of Attorney's Fees to Attorneys Pro Tem or, in the event the Commissioners Court did not act, for dismissal of this appeal for lack of jurisdiction. The appeal was abated for a period of thirty days or until we received a supplemental clerk's record containing evidence of a Commissioners Court vote on the issue of payment.

On May 22, the Commissioners Court voted to reject the invoice payment and further voted to "authorize counsel to challenge" the Second Order on Payment of Attorney's Fees to

Attorneys Pro Tem. A supplemental clerk's record was filed on June 2 containing the Commissioners Court's order reflecting its vote.

Blackard's suit alleges that the payment ordered by the district court was illegal because it failed to comply in both timing and amount with the Collin County Local Rules and the Texas Fair Defense Act. His standing, if any, was solely as a taxpayer seeking to enjoin the illegal expenditure of public funds. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 556 (Tex. 2000). Because the Commissioners Court has rejected the invoice and has authorized counsel to challenge the district court's order, no pending "illegal" expenditure of public funds currently exists for Blackard to seek to enjoin.

Blackard has moved this Court to continue to abate his suit indefinitely based on the possibility that the Commissioners Court may, at some point in the future, approve payment of a fee invoice at a time and in an amount that he contends is illegal. As we stated in our earlier opinion, for jurisdiction to exist, a matter must be ripe for resolution. *See Blackard*, 2017 WL 343597 at *8. Although a claim need not be fully ripened at the time suit is filed, the facts must be sufficiently developed to determine that an injury has occurred or is likely to occur. *See Robinson v. Parker*, 353 S.W.3d 753, 755 (Tex. 2011). At this point, Blackard's alleged injury is speculative. *See Scarborough v. Metro. Transit Auth. of Harris Cnty.*, 326 S.W.3d 324, 338 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). Blackard has not shown, and this record does not indicate, when or in what amount the Commissioners Court is likely to approve a payment. Because Blackard's alleged injury depends on the occurrence of contingent future events that may not occur, there is no subject matter jurisdiction over his claims for injunctive relief. Although the trial court denied Blackard's request for injunctive relief, the proper disposition is to dismiss those claims for want of jurisdiction. *See Patterson v. Planned*

Parenthood of Houston and Se. Tex., Inc., 971 S.W.2d 439, 444 (Tex. 1998) (claims not ripe for adjudication due to absence of imminent harm dismissed for want of jurisdiction).

Based on the foregoing, we order the stays imposed by our orders of January 30, 2017 and February 10, 2017 lifted in their entirety. We deny Blackard's motion to abate this appeal. We vacate the trial court's order denying Blackard's request for injunctive relief and dismiss the injunctive relief claims for want of jurisdiction. We express no opinion on the trial court's jurisdiction over the remaining claims for declaratory relief. *See Retta v. Mekonen*, 338 S.W.3d 72, 76 (Tex. App.—Dallas 2011, no pet.) (no authority to consider jurisdiction over other underlying causes of action on appeal from temporary injunction). We remand the cause to the trial court for further proceedings.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

170094F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JEFFORY BLACKARD, Appellant

No. 05-17-00094-CV V.

KENT A. SCHAFFER, IN HIS OFFICIAL CAPACITY, BRIAN W. WICE, IN HIS OFFICIAL CAPACITY, NICHOLE DEBORDE, IN HER OFFICIAL CAPACITY, COLLIN COUNTY JUDGE KEITH SELF, IN HIS OFFICIAL CAPACITY, COMMISSIONER SUSAN FLETCHER, IN HER OFFICIAL CAPACITY, COMMISSIONER CHERYL WILLIAMS, IN HER OFFICIAL CAPACITY, COMMISSIONER CHRIS HILL, IN HIS OFFICIAL CAPACITY, COMMISSIONER DUNCAN WEBB, IN HIS OFFICIAL CAPACITY, AND AUDITOR JEFF MAY, IN HIS OFFICIAL CAPACITY, Appellees

On Appeal from the 380th Judicial District Court, Collin County, Texas
Trial Court Cause No. 380-00320-2017.
Opinion delivered by Justice Francis.
Justices Brown and Schenck participating.

In accordance with this Court's opinion of this date, we **VACATE** the trial court's order denying Jeffory Blackard's request for injunctive relief and **DISMISS** Jeffory Blackard's claims for injunctive relief for want of jurisdiction.

We **REMAND** this cause to the trial court for further proceedings.

It is **ORDERED** that appellees KENT A. SCHAFFER, IN HIS OFFICIAL CAPACITY, BRIAN W. WICE, IN HIS OFFICIAL CAPACITY, NICHOLE DEBORDE, IN HER OFFICIAL CAPACITY, COLLIN COUNTY JUDGE KEITH SELF, IN HIS OFFICIAL CAPACITY, COMMISSIONER SUSAN FLETCHER, IN HER OFFICIAL CAPACITY, COMMISSIONER CHERYL WILLIAMS, IN HER OFFICIAL CAPACITY, COMMISSIONER CHRIS HILL, IN HIS OFFICIAL CAPACITY, COMMISSIONER

DUNCAN WEBB, IN HIS OFFICIAL CAPACITY, AND AUDITOR JEFF MAY, IN HIS OFFICIAL CAPACITY, recover their costs of this appeal from appellant JEFFORY BLACKARD.

Judgment entered this 9th day of June, 2017.