No. 17-0588

In the Supreme Court of Texas

ERIC HILLMAN,
PETITIONER/PLAINTIFF,

v.

NUECES COUNTY, TEXAS AND THE NUECES COUNTY DISTRICT ATTORNEY'S OFFICE,
RESPONDENTS/DEFENDANTS.

Amicus Curiae Brief of the Texas Criminal Defense Lawyer's Association in Support of Petitioner

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INTEREST OF AMICUS CURIAE

The Texas Criminal Defense Lawyers Association (TCDLA) is a non-profit, voluntary, membership organization. It is dedicated to the protection of those individual rights guaranteed by the state and federal constitutions and the constant improvement of the administration of criminal justice in the State of Texas.

Founded in 1971, TCDLA currently has a membership of over 3,400 and offers a statewide forum for criminal defense counsel. It provides a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases. TCDLA also seeks to assist the courts by acting as *amicus curiae* in appropriate cases.

Neither TCDLA nor any attorney representing TCDLA have received any fee or other compensation for preparing this brief.

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TO THE HONORABLE TEXAS SUPREME COURT:

COMES NOW, the Texas Criminal Defense Lawyers Association, *Amicus Curiae*, and respectfully submits this Amicus Curiae Brief in Support of Petitioner.

Amicus urges the Court to apply *Sabine Pilot* to governmental agents in district attorney offices. Inasmuch as the innocent defendant is concerned, *Amicus* relies on the previously filed briefs. *Amicus* writes, however, to address the special concerns involving guilty defendants, as follows:

INTRODUCTION

Criminal cases lack nearly all the discovery tools that are available in even the most routine car accident case. Instead, in a criminal case and even in a capital case, access to the most basic discovery materials hinges on the assistant district attorney's (ADA's) compliance with Supreme Court precedent and state law. The entire system depends on their honesty.

The TCDLA and its members believe most ADAs honor the laws requiring them to turn over evidence. Many of its members, however, have also experienced the rare ADA who refuses to comply with those laws. Consequently, it can attest that the system fails when ADAs—on their own or at the instruction of their superiors—withhold discovery, or, even worse, maliciously conceal evidence that might exonerate the defendant.

The TCDLA seeks protection for honest prosecutors because it has first-hand experience with how vital they are to the system. No ADA should have to choose between complying with the laws and keeping their job. For this reason, *Amicus* strongly urges this Court to recognize *Sabine Pilot* applies to governmental employees—specifically ADAs and those entrusted with the duty sharing evidence in criminal cases.[1]

[1] *Amicus* acknowledges the persuasive arguments made by *amici curiae*, Innocence Project, Inc. and Innocence Project of Texas (hereinafter *amici*). *Amicus* formally endorses *amici's* brief. It has endeavored not to repeat *amici's* arguments.

ARGUMENT

OUR SYSTEM MUST PROVIDE PROTECTION FOR ADAS WHOSE ACTIONS ARE COMPELLED BY SUPREME COURT LAW AND STATUTORY MANDATES

I. As a Check Against Their Incredible Power, District Attorneys are Legally Required to Turn Over Favorable Evidence

Prosecutors wield a power that is part of the State's most profound act—the ability to strip a person of liberty and even of life itself. They have access to manpower and resources incomparable to anyone else. The wealthiest company in America cannot access information with the speed and ease of law enforcement working on the side of the prosecution.

This incredible power does not go unchecked. The Supreme Court has mandated prosecutors must turn over to the defendant evidence material to his guilt or his punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976); *Pena v. State*, 353 S.W.3d 797, 809 (Tex. Crim. App. 2011).

There are some prosecutors who refuse to follow *Brady*. This has happened in Texas, with disastrous results. In response to one well-known case, that of Michael Morton, the Texas Legislature imposed expansive discovery requirements on prosecutors. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14. Thus, there are federal constitutional minimums for prosecutors, which the legislature has further expanded in the State of Texas.

II. The System Relies Upon Honest Prosecutors

Ironically, the only one who can act as a check on the prosecution is the prosecution itself. No one but the prosecutor and members of his team know what are in the State's files. Thus, *Brady* and the Michael Morton Act (MMA) are of little solace to a defendant concerned that an unscrupulous prosecutor is withholding evidence. That defendant is powerless. The only people in the system who can act as a check and ensure compliance with the law are other prosecutors. For the integrity of our system and the sake of our laws, those honest prosecutors must have some kind of protection. We count on them, and we must accordingly protect them.

A. The ability to discover information lies with the prosecution

No one can obtain information like law enforcement. Teams of people working with the prosecution can obtain decades of information about a person with the click of a button. They have labs of forensic scientists at their disposal and highly trained and experienced investigators at their beck and call. Defendants simply cannot afford a team that is anything like the prosecution's. Even the wealthiest of defendants still do not have the access to information and the power of the State's teams. Simply put, no one has anywhere close to the number of resources prosecutors have.

And no one knows (especially pre-trial) if the prosecutors are sharing their information. In the civil world, there are depositions, interrogatories, and months of open communications about each other's cases. Not so in the criminal world. The only way for a defendant to test the prosecution's evidence is through trial. Without a trial, everyone must simply take the prosecutor's word that he has turned over everything—there is almost no mechanism to verify their compliance. Of course, the vast majority of cases never go to trial.

B. The honest prosecutor is essential in the system of guilty pleas

The TCDLA's members often represent clients who admit their guilt to an offense. Indeed, ninety-four percent (over 200,000) of the criminal convictions in 2017 were the result of a guilty plea. Office of Court Administration, *Annual Statistical Report for the Texas Judiciary: Fiscal Year 2017*, pg. 65 (2017).

When a defendant pleads guilty, clearly there is no trial. There is no opportunity to discover, through the adversary process, any evidence the prosecution did not turn over. Thus, most of the time no one will ever know whether the prosecution turned over *Brady* and MMA evidence.

In order for the plea system to work properly, the defendant must understand the strength of the State's case against him. If, for example, there are witness statements in his favor or forensic testing comes back as inconclusive, then he needs to know about that. That information rightly informs the plea negotiations. It is not only relevant as to the decision itself, but it is relevant to what plea is reasonable.

Additionally, the State has almost unfettered discretion in determining how to structure the prosecution of a case. It can charge a defendant with any offenses it believes are warranted. So a fight, for example, may be charged as attempted murder, aggravated assault, or deadly conduct—with the latter two being lesser-included offenses of the greater offense. A very common strategy, consequently, is for the State to charge a defendant with the greatest possible offense under the facts of the case buffeted by the knowledge that if it fails to prove the elements of the greater offense in can still convict the defendant of a lesser-included offense.

So it is not at all unusual for a defendant to face an indictment alleging a offenses spanning a large range of possible punishments. In the scenario from above, for example, that defendant would be facing a first-degree felony, second-degree felony, and a class A misdemeanor, with a range of punishment from one year to ninety-nine years.

When a State charges a defendant with multiple offenses, the defendant can plead guilty to any of those offenses (and the State simply waives the remaining ones). The decision about which offense is most reasonable to plead to is based on the State's case, as represented by the prosecutor. If the prosecutor holds back exculpatory evidence, the defendant will not fully understand the strength of the State's case. In his ignorance, he may plead to a greater charge than the State could actually prove.

So, continuing with the example from above, the defendant is facing ninety-nine years' incarceration, which is obviously a very scary number for most people. That defendant may think a plea for thirty years is a good choice. But there may be other evidence out there undermining the State's case. Depending on that evidence, thirty years may be far too much; five years may be much more reasonable of a plea for both parties.

In the civil world, both sides will negotiate a fair deal usually knowing the other side's evidence. In the criminal world, all trust is placed on the State to share the evidence because it has unparalleled information-gathering power. Our system of guilty pleas is based upon the presumption of the honest prosecutor. In order to protect or system, we must protect that prosecutor. We must encourage compliance with *Brady* and the MMA, and we must protect those who seek to abide by those rules.

III. *Sabine Pilot* Provides a Means to Protect the Honest Prosecutor

The honest prosecutor needs protection. If he is going to turn over evidence in compliance with *Brady* and the MMA, he needs to know he cannot lose his job for doing so. That protection can be found in already-established law created by this Court.

Thirty-three years ago this Court created a narrow exception to the traditional rule permitting termination of an at-will employee without cause; in *Sabine Pilot*, this Court prohibited employers from terminating an employee "for the sole reason that the employee refused to perform an illegal act," at least when the "laws of this state and the United States which carry criminal penalties" are implicated. *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985); *see Peine v. Hit Servs. L.P.*, 479 S.W.3d 445, 449 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Dodds v. Terracon Consultants, Inc.*, 104 F. Supp. 3d 844, 849 (S.D. Tex. 2015).

Sabine Pilot is based on the axiom that no one should be forced to choose between committing an illegal act and keeping his job. *See Physio GP, Inc. v. Naifeh*, 306 S.W.3d 886, 888 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The strength of this position and the reasoning of *Sabine Pilot* is neither dictated nor impacted by whom the person works for. A prosecutor is just as worthy of its protections as anyone else.

A. *Sabine Pilot* never distinguished between a private and governmental employee

In *Sabine Pilot*, this Court wrote, "The sole issue for our determination is whether an allegation by *an employee* that he was discharged for refusing to perform an illegal act states a cause of action." (emphasis added). *Sabine Pilot Serv., Inc.*, 687 S.W.2d at 734. This Court never predicated its opinion on the fact that the plaintiff was a non-governmental employee nor did this Court caution that the holding was limited to private employees. *Id*. Instead, this Court characterized the plaintiff as "an employee" without concern for whether he was a private or public employee. *Id*.

Indeed, the concurrence went further writing:

> As [employment at-will] was a judicially promulgated doctrine, this court has the burden and the duty of amending it to reflect social and economic changes. Our duty to update this doctrine is particularly urgent when the doctrine is used as leverage to incite violations of our state and federal laws. Allowing an employer to require an employee to break a law or face termination cannot help but promote a thorough disrespect for the laws and legal institutions of our society.
>
> The court admittedly carves out but one exception to employment at will, but I do not fault the court for the singleness of its exception. *The issue before the court was whether a cause of action existed under this particular fact situation: termination of an employee for his refusal to violate a law with a criminal penalty*. There was no need for the court to create any other exception to employment at will in order to grant [Petitiner] his requested relief. *But, our decision today in no way precludes us from broadening the exception when warranted in a proper case*.

Id. at 735 (Kilgarlin, J. concurring) (emphasis added).

Intermediate courts of appeals have severely, and unnecessarily, limited *Sabine Pilot*, and in doing so have missed the point and everything the case stands for. *See Midland Indep. School Dist. v. Watley*, 216 S.W.3d 374, 376 (Tex. App.—Eastland 2006, no pet.); *Salazar v. Lopez*, 88 S.W.3d 351, 353 (Tex. App.—San Antonio 2002, no pet.); *Univ. of Tex. Med. Branch at Galveston v. Hohman*, 6 S.W.3d 767, 777 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd w.o.j.); *Carroll v. Black*, 938 S.W.2d 134, 134–35 (Tex.App.-Waco 1996, writ denied)

B. ADAs especially need the protection of *Sabine Pilot*

Courts and the Texas Legislature have created checks upon the prosecution's vast powers. Those checks are founded upon the Constitution and a recognition that, above all, constitutional rights deserve fervent protection. And when the Texas Legislature passed the Michael Morton Act just five years ago, it reflected a shift in the public's understanding that not all prosecutors are honest, and those who are dishonest can wreak havoc on our system in ways that may not be discovered for decades, if at all. Society has only recently begun to recognize that as with every single other profession known to man, the prosecution cannot be trusted with absolute, unchecked power.

The prosecutors are the guardians of *Brady* and the MMA, and we entrust they will comply with the laws and they will speak up when they see a lack of compliance. As the instant case proves, however, these honest prosecutors themselves obviously at times need protection from their own. The Court now has the ability to formally recognize the shift in society's requirements of its prosecutors and empower them with the means to execute the laws created by the Supreme Court and the Texas Legislature.

Amicus thus asks this Court to acknowledge that *Sabine Pilot* was never limited to non-governmental employees and that the intermediate-appellate courts that have relied on this distinction have erred. Differences exist between governmental and non-governmental employees but in the context of *Sabine Pilot* the distinction is without significance; public servants should have the same protection from having to choose between committing an illegal act and losing their job as a private employee. The rules of discovery in criminal cases place a heavy burden on district attorneys and assistant district attorneys and often place these public officials in the position of mustering and surrendering documents or evidence that will impair the State's case. These attorneys should not be denied the protections of *Sabine Pilot* based on a distinction between governmental and non-governmental employees that this Court never made.

PRAYER

The TCDLA prays the Court will reverse the decision below and remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this Petition was served on the following parties/entities on August 22, 2018 electronically at the e-mail address each party has listed with the state e-filing service.

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CERTIFICATE OF COMPLIANCE

I certify the foregoing Brief on the Merits complies with Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure. The brief, excluding those portions detailed in Rule 9.4(i) of the Texas Rules of Appellate Procedure, is 2,395 words long. I have relied upon the word count function of Microsoft Word, which is the computer program used to prepare this document, in making this representation.

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