No. 17-0731

IN THE
SUPREME COURT OF TEXAS

STEVEN McCRAW, IN THE OFFICIAL CAPACITY AS THE DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY,
Petitioner,
V.

C.I.,
Respondent.

ON PETITION FOR REVIEW FROM THE NINTH COURT OF APPEALS,
BEAUMONT TEXAS
09-16-00302-CV

BRIEF OF AMICUS CURIAE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

ANGELA J. MOORE
310 S. St. Mary's, Suite 1910
San Antonio, Texas 78205
(210) 227-4450 office
(844) 604-0131 Facsimile
amoorelaw2014@gmail com
SBN: 14320110

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

BRIEF OF AMICUS CURIAE TEXAS CRIMINAL DEFENSE ASSOCIATION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF TEXAS:

COMES NOW Texas Criminal Defense Lawyers Association ("Amicus TCDLA"), and, pursuant to Rule 11 of the Texas Rules of Appellate Procedure, respectfully submits this as amicus curiae brief to assist the Court in considering the issues presented by the petition for review in this case. Amicus TCDLA urges the Court to affirm the opinion and judgment of the Ninth District Court Appeals below.

INTEREST OF AMICUS TCDLA

Statement Pursuant to Rule 11, TEX.R.APP.PRO.

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

criminal defense and forfeiture cases, as well as seeking to assist the courts by acting as amicus curiae.

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

PURPOSE OF BRIEF

Amicus TCDLA submits this brief in support of Respondent and urges the Supreme Court to affirm the Trial Court's order which denied the plea to jurisdiction of Petitioner McCraw ("Petitioner"). In accordance with Rule 11(a) of the Texas Rules of Appellate Procedure, Amicus TCDLA has omitted from this brief items not required to be included in Respondent's brief under Rule 55.3 of the Texas Rules of Appellate Procedure.

RELEVANT STATUTES AND ARGUMENT AND AUTHORITIES

A. *Texas Plea Bargain Agreements*

A **plea bargain** is a contractual arrangement between the State and the defendant. *Moore v. State*, 295 S.W.3d 329, 331 (Tex.Crim.App.2009); *Ex parte Moussazadeh*, 64 S.W.3d 404, 411 (Tex.Crim.App.2001); *Ortiz v. State*, 933 S.W.2d 102, 104 (Tex.Crim.App.1996). When a trial court gives express approval

for a plea agreement, it binds all necessary parties to the agreement—the defendant, the State, and the court—to a contract. *Bitterman v. State*, 180 S.W.3d 139, 142 (Tex.Crim.App.2005); *Ortiz*, 933 S.W.2d at 104; *Wright v. State*, 158 S.W.3d 590, 593–94 (Tex.App.-San Antonio 2005, pet. ref'd).

Thus, once a trial court has accepted a plea agreement, it has a "ministerial, mandatory, and non-discretionary duty" to enforce the **plea bargain** it approves. *Perkins v. Court of Appeals for the Third Supreme Judicial Dist.*,738 S.W.2d 276, 284–85 (Tex.Crim.App .1987); *Wright*, 158 S.W.3d at 595;*In re Gooch*, 153 S.W.3d 690, 694 (Tex.App.-Tyler 2005, orig. proceeding)(mandamus relief granted when trial court violated mandatory duty to enforce **plea-bargain** agreement). Further, once approved by the trial court, the defendant may insist on the benefit of his plea agreement with the State. *Blanco v. State*, 18 S.W.3d 218, 220 (Tex.Crim.App.2000); *see Bitterman*, 180 S.W.3d at 142–43; *Wright*, 158 S.W.3d at 593–94. If such agreement with the State can be enforced, the defendant is entitled to seek specific performance of the plea agreement; if the agreement cannot be enforced, the defendant is entitled to withdraw his plea. *Bitterman*, 180 S.W.3d at 143; *Perkins*, 738 S.W.2d at 283–284; *Wright*, 158 S.W.3d at 594.

General contract law principles apply to the review of issues involving the content of a plea agreement in a criminal case. *Moussazadeh*, 64 S.W.3d at

411; *Brunelle v. State*, 113 S.W.3d 788, 790 (Tex.App.-Tyler 2003, no pet.); *Smith v. State*, 84 S.W.3d 36, 40 (Tex.App.-Texarkana 2002, no pet.). Thus, we look to the written plea agreement, as well as the formal record of the plea proceedings, to determine the terms of the plea agreement and discern the obligations of the parties. *See Moussazadeh*, 64 S.W.3d at 411–12;*Costilow v. State*, 318 S.W.3d 534, 537 (Tex.App.-Beaumont 2010, no pet.); *see also Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 728 (Tex.1981); *Danciger Oil & Ref. Co. v. Powell*, 154 S.W.2d 632, 635 (Tex.1941). Any finding that a particular **plea-bargain** term formed an essential part of the plea agreement must be founded upon the express terms of the written plea agreement itself, the formal record of the plea hearing, or the written or testimonial evidence submitted by both the prosecution and applicant in a habeas corpus proceeding. *See Moussazadeh*, 64 S.W.3d at 412.

A court will look beyond the written agreement or record and imply a covenant or term only when necessary "to effectuate the intention of the parties as disclosed by the contract as a whole." *Moussazadeh*, 64 S.W.3d at 411(quoting *Danciger*, 154 S.W.2d at 635); *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 888 (Tex.1998). An implied covenant or term is sufficiently necessary to the parties' intentions only if the obligation "was so clearly within the contemplation of the parties that they deemed it unnecessary to express

...." *Moussazadeh*, 64 S.W.3d at 411 (quoting *Danciger*, 154 S.W.2d at 635). (here, obligation to register as a sex offender)

The courts will not imply a term unless it appears from the plea agreement's express terms that both parties clearly contemplated this element or covenant. *See Moussazadeh*, 64 S.W.3d at 411–12; *HECI*, 982 S.W.2d at 888; *see also In re Bass*, 113 S.W.3d 435, 743 (Tex.2003) (implied covenants not favored by law and will not be read into contracts except as legally necessary to effectuate plain, clear, unmistakable intent of parties).

B. *History of Plea Bargains*

In a former era a defendant was expected to plead guilty (often without a lawyer) and throw himself on the mercy of the court with no assurance of the punishment to follow. The defendant's decision to do so was first manifested in court when the plea was entered. At that time it was crucial that the court give the defendant information about the consequences of a plea of guilty so that the decision to do so could be voluntary and knowing.

But the practice of **plea bargaining**, which was made necessary by the lack of judicial resources, shifted the crucial decision in most cases to a **plea-bargain** agreement that was struck between attorneys for the State and the defendant in a negotiation that took place off the record. For the felony courts of Texas this

practice was recognized and regulated by statute in 1977. Now in a **plea-bargain** case the defendant knows, and has accepted before the plea is entered, the most important consequence of the plea of guilty: the upper limit on punishment. Even when the record shows that the trial court erred in admonishing a defendant before his plea is accepted, the plea will not be held involuntary on appeal if the defendant knew the punishment he was facing and the trial court followed the plea agreement. In a real sense, therefore, when the legislature identified cases in which the trial court followed the **plea-bargain** agreement, it identified cases in which the pleas were voluntary.

The number of cases in which the plea is involuntary when the trial court followed the plea agreement is therefore very small, and the number of cases in which the involuntariness would appear in an appellate record is even smaller. Experience has shown us that most cases of involuntary pleas result from circumstances that existed outside the record, such as misunderstandings, erroneous information, impaired judgment, ineffective assistance of counsel, and **plea-bargains** that were not followed or turn out to be *impossible of performance*. The legislature reasonably determined to eliminate a small number of meritorious appeals to prevent a much larger number of meritless appeals.

This decision may be seen as even more reasonable when it is

remembered that meritorious claims of involuntary pleas may be raised by other procedures: motion for new trial and habeas corpus. These procedures are not only adequate to resolve claims of involuntary pleas, but they are superior to appeal in that the claim may be supported by information from sources broader than the appellate record. Here, the procedural provisions do not provide for a vehicle for which a criminal defendant can relief on a requirement to register as a sex offender which is outside the statute, ignores the district court's findings and Orders, and creates a carte blanche for any agency to override the plea bargain agreements and add requirements or disabilities which overrides all constitutional and statutory law applicable to plea bargain agreements.

The proviso in Code of Criminal Procedure article 26.13(a)(2) that requires the court to inquire into **plea-bargain** agreements, and that permits the plea to be withdrawn if the court rejects the agreement, was added by the Act of May 27, 1977, 65th Leg., R.S., ch. 280, 1977 Tex. Gen. Laws 748. Actually, in most cases the precise punishment is known, because trial courts almost always follow the recommendation that was bargained for. This was true even before 1977, when article 26.13 was amended to recognize and regulate the entry of pleas that were the result of **plea bargaining**. "It is no secret, however, that plea negotiations

are basically honored by the courts of the State of Texas as they are throughout the United States. If the judges began not to honor plea negotiations and to set independent or separate sentences, the inducement to plead guilty to a particular charge would be removed and defendants would pursue their rights to trial by jury. If these rights were pursued, the additional thousands of jury trials would force the system to grind to a halt." Robert G. Bogomolny, *Criminal Prosecution and Defense, in* THE IMPACT OF THE TEXAS CONSTITUTION ON THE **CRIMINAL JUSTICE** SYSTEM70–71 (Allan K. Butcher et al. eds., 1973).

"In Harris County, at least, the district attorney's office, by controlling the **plea bargaining** process, is able to exercise a quasi-judicial power in the area of criminal sentencing. For the most part, the sentences of felons are determined outside of court during plea negotiations, and the judges are extra legally forced to accept the great majority of these pre-arranged sentences because of the overwhelming caseload with which the courts are burdened." James N. Johnson, *Sentencing in the Criminal District Courts,* 9 HOUS. L.REV.944, 994–95 (1972).

A fortiori is it true today. In State Fiscal Year 2017,[1] in the district courts of Texas which have jurisdiction of felony prosecutions, 94% of convictions were obtained by guilty pleas. *See* OFFICE OF COURT ADMINISTRATION,

[1] http://www.txcourts.gov/media/1441398/ar-fy-17-final.pdf#page=4

ANNUAL REPORT OF THE TEXAS JUDICIAL SYSTEM—FISCAL YEAR 2017 (based on deferred adjudications and judgments of conviction without a jury). This proportion of guilty pleas could not be maintained if trial courts departed from **plea-bargain** recommendations to any significant degree.

The plea bargain process will be effectively emasculated. The 94% of criminal convictions in Texas disposed of by the plea process would be placed on the trial docket, since a plea bargain in Texas can never be considered binding and enforceable. With thousands of criminal cases sitting dormant on already crowded criminal trial dockets, speedy trial and Due Process considerations will force this State and its 254 counties to build hundreds of courthouses across Texas. These courthouses must be staffed with support staff, county workers, county law enforcement, prosecutors, and defense attorneys, the majority of which will be court appointed. The cost to the State of Texas will mind boggling, all due to a State Agency is allowed to bulldoze over the court system and judicial jurisdiction and authority. The concept of Occam's Razor easily applies here. The easiest path to restoring justice in the plea bargain process is to keep the plea bargain processes to remain in the courtroom and not in the office of a State bureaucrat.

CONCLUSION

Should Texas allow this usurpation by a State Agency or Entity to consume the sanctity of a knowing and voluntary plea, effective assistance of counsel, and acceptance and enforcement by the trial court, the plea bargain process will never be binding on the parties. As such, any competent criminal defense attorney would never allow a client to enter a plea bargain when such devasting requirements create insurmountable burdens on the defendant's life, liberty, and happiness, for the rest of his natural life. Sex offender registration affects where a defendant will live, who he can associate with, disallowance of attending church, disallowance of living near a park or school, and forces a criminal defendant to take circuitous driving routes to avoid places children may be present. Such disabilities and hardships when a criminal defendant has paid his debt to society, and was no part of the plea bargain agreement. Such draconian measures must stop.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Amicus Curiae Texas Criminal Defense Lawyers Association prays the District Court's denial of Petitioner's plea to jurisdiction, and the Ninth District Court of Appeals' opinion and judgment which sustained the District Court's denial of Petitioner's plea to jurisdiction, will in all things AFFIRMED.

Respectfully submitted,

/s/Angela J. Moore
ANGELA J. MOORE
SBN: 14320110
Tower Life Building
310 South St. Mary's St., Suite 1910
San Antonio, Texas 78205
Telephone: (210) 227-4450
Fax: (210) 800-9802
angela@angelamoorelaw.com

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(i)(e). This document also complies with the word-count limitations of Rule 9.4(i)(2)(D) because it contains 2,408 words total.

/s/ Angela J. Moore
ANGELA J. MOORE

CERTIFICATE OF SERVICE

This is to certify that on this 21th day of September 2018, in accordance with Rules 9.5 and 11(d) of the Texas Rules of Appellate Procedure, a true correct copy of this brief was served electronically using the E-File Texas service system, on all parties to this cause, by and through their Counsel of Record identified below, using the email addresses stated:

Bill Davis
Assistant Solicitor of General Texas
bill.davis@oag.texas.gov
Counsel for Petitioner

Ryan W. Gertz
The Gertz Law Firm
rgertz@gertzlawyers.com
Counsel for Respondent

Richard Gladden
richscot1@hotmail.com
Counsel for Texas Voices for Reason and Justice, Inc. in support of Respondent

/s/Angela J. Moore
ANGELA J. MOORE