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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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TERRI REGINA LANG, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Burnet County

* * * * *

STATE PROSECUTING ATTORNEY'S
PRE-SUBMISSION AMICUS BRIEF

* * * * *

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TO THE COURT OF CRIMINAL APPEALS

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* * * * *

STATE PROSECUTING ATTORNEY'S AMICUS BRIEF[1]

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

> Every legislator has an intent, which usually cannot be discovered, since most say nothing before voting on most bills; and the legislature is a collective body that does not have a mind; it 'intends' only that the text be adopted and statutory texts usually are compromises that match no one's first preference.[2]

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[1] As the State Prosecuting Attorney, there is no fee attached to this filing. TEX. R. APP. P. 11.

[2] Antonin Scalia & Bryan A. Garner, Judge Frank H. Easterbrook's Forward to (continued...)

The State Prosecuting Attorney submits this post-submission amicus brief in opposition to Appellant's suggestion to overrule *Boykin v. State*. 818 S.W.2d 782 (Tex. Crim. App. 1991) (en banc). Strict textualism achieves certainty, fairness, and proper governance; non-textualism, on the other hand, promotes anarchy through an arbitrary and unpredictable selection among a constellation of extra-textual factors that can never parallel the legitimacy of the statute itself.

1. Keeping Up With the Texas Supreme Court.

Recently the State Prosecuting Attorney urged the Texas Supreme Court to remain in lockstep with this Court on evidentiary sufficiency and fundamental error. *In re A.F.*, No. 15-0861, State Prosecuting Attorney's Amicus Brief in Support of Refusing Review.[3] Now it is time to advocate the same principle to this Court.

In *Bankdirect Capital Finance, LLC. V. Plasma Fab, LLC.*, the Texas Supreme Court firmly rejected eschewing a plain-text statutory interpretation analysis in favor of Texas Government Code Section 311.023.[4] It stated, "Interpretive prescriptions,

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[2](...continued)
Reading Law: The Interpretation of Legal Texts xxii (2012) (emphasis in original); *see also Boykin*, 818 S.W.2d at 785 ("We focus on the literal text also because the text is the only definitive evidence of what the legislators (and perhaps the Governor) had in mind when the statute was enacted into law.").

[3] http://www.search.txcourts.gov/Case.aspx?cn=16-0861&coa=cossup.

[4] The Code Construction Act was enacted in 1967 and applies to all codes,
(continued...)

or permissions, to put a finger on the scale and stretch text beyond its permissible meaning invade the courts' singular duty to interpret the laws." 519 S.W.3d 76, 85 (Tex. 2017). Former Justice Willett, now a newly appointed federal judge on the Fifth Circuit Court of Appeals, writing for the Court explained:

> The Code Construction Act's textual definitions can clarify meaning, but its nontextual enticements can cloak meaning. That is precisely why we have often rejected the Act's thumb-on-the-scale devices, because in today's statute-laden era, how we decide—legisprudence: the jurisprudence of legislation—matters as much as what we decide. We must resist the interpretive free-for-all that can ensue when courts depart from statutory text to mine extrinsic clues prone to contrivance. The Code Construction Act offers a buffet of interpretive options, but to our credit, we have often been picky eaters, opting instead for a simpler, less-manipulable principle: Clear text equals controlling text.
>
> . . .
>
> Separation of powers demands that judge-interpreters be sticklers. Sticklers about not rewriting statutes under the guise of interpreting them. Sticklers about not supplanting our wisdom for that of the Legislature. Sticklers about a constitutional design that confers the power to adjudicate but not to legislate.

Id. at 84, 86.[5] The Texas Supreme Court is absolutely correct,[6] and there is no

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[4](...continued)
amendments, repeals, revisions, and re-enactments by the 60th (1967) or subsequent legislature. Acts 1967, 60th Leg., ch. 455, § 3.03, eff. Sept. 1, 1967; TEX. GOV'T CODE § 311.002.

[5] Additionally, the Texas Supreme Court has previously elaborated on the role and actions of the Legislature:

> 'There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are

(continued...)

justifiable reason for this Court to renounce the lockstep commandment it has faithfully obeyed. *See, e.g., Vandyke v. State*, __ S.W.3d__, PD-0283-16, 2017 WL 6505800, at *6 (Tex. Crim. App. 2017) ("Our sister court has spoken eloquently on the constitutional limits on the Legislature's authority: '[T]he Legislature is without authority to add or take away from those powers or duties or substantially alter them.'"); *Fleming v. State*, 341 S.W.3d 415, 417 (Tex. Crim. App. 2011) (Keasler, J., concurring) ("With the Texas Supreme Court's precedent on substantive due process

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[5](...continued)

> directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds.' It is not the function of the courts to judge the wisdom of a legislative enactment.

Texas State Bd. of Barber Examiners v. Beaumont Barber Coll., Inc., 454 S.W.2d 729, 732 (Tex. 1970) (quoting *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968)).

[6] In line with the Court's recent statements about the Code Construction Act, the Court, decades ago, said,

> Although the general aid and guidance of the Code Construction Act of 1967 is applicable to subsequently enacted legislation, it is not designed and should not be construed to engraft substantive provisions onto subsequently enacted legislation when the language, meaning, and interpretation of such legislation are, standing alone, indisputably clear. Thus, the Code Construction Act provides, not rules of substantive law which become part of subsequently enacted legislation, but principles of construction that are necessarily subordinate to the plain intent of the Legislature as manifested in the clear language of statutes . . . .

Thiel v. Harris County Democratic Executive Comm., 534 S.W.2d 891, 894 (Tex. 1976).

firmly established, it would make no sense to reach an [sic] decision that conflicts with our sister court.”).

2. Section 311.023’s Compatibility With *Boykin* is Not Ambiguous.

As the District Attorney points out in his brief, Section 311.023 is permissive, not mandatory. State’s Brief at 27. “[A] court *may consider* among other matters . . . .” TEX. GOV’T CODE § 311.016 (“‘May’ creates discretionary authority or grants permission or a power.”). Therefore, it does not violate separation of powers and does not conflict with *Boykin*.

Importantly, the Legislature has recognized this. Since this Court’s 1991 decision in *Boykin*, long after the enactment of Section 311.023, this Court has followed the plain-text doctrine in construing hundreds of statutes. It is presumed that the Legislature is aware of these statutory interpretation cases and, having made no effort to make Section 311.023 mandatory, it has approved of the harmonious interdependent *Boykin*/Section 311.023 paradigm. *See State v. Colyandro*, 233 S.W.3d 870, 878 (Tex. Crim. App. 2007) (“where a statute has been reenacted by the Legislature with knowledge of the judicial construction thereof a court would not be justified in overruling such decision.”).

It is worth pointing out that Section 311.023’s list includes considerations that are actually part and parcel to a plain-text analysis, contrary to what this Court has

indicated over the years.[7] Those plain-text considerations include: "common law or former statutory provisions, including laws on the same or similar subjects";[8] "consequences of a particular construction";[9] and, "title, caption, preamble, and

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[7] *See Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016). This Court has on many occasions summarily referred to Section 311.023 as listing extra-textual factors.

[8] *See, e.g., Vandyke*, 2017 WL 6505800, at *4, 15 (comparing TEX. HEALTH & SAFETY CODE §§ 841.082, 841.085 before, and after June 2015 amendments); *Ex parte White*, 506 S.W.3d 39, 49 (Tex. Crim. App. 2016), *cert. denied sub nom*. *White v. Texas*, 138 S. Ct. 136 (2017) ("the legislature was on notice of how the words 'would not have been convicted' were being construed by this Court in a closely related context."); *Ellison v. State*, 201 S.W.3d 714, 718-21 (Tex. Crim. App. 2006) (comparing prior and current sentencing admissibility statutes); *see also* Antonin Scalia & Bryan A. Garner *Reading Law: The Interpretation of Legal Texts* 252 ("Related Statute Canon": "Statutes *in pari materia* are to be interpreted together, as though they were one law"), 256 ("Reenactment Canon": "If the legislature amends or reenacts a provision other than by way of consolidating statute or restyling project, a significant change in language is presumed to entail a change in meaning."), 318 ("Presumption Against Change in Common Law": "A statute will be construed to alter common law only when that disposition is clear."), 322 ("Prior-Construction Cannon": "If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even a uniform construction by inferior courts or a responsible administrative agency, they are to be understood according to that construction.").

[9] *Boykin*, 818 S.W.2d at 785-86 ("If the plain language of a statute would lead to absurd results, or if the language is not plain but rather ambiguous, then and only then, out of absolute necessity, is it constitutionally permissible for a court to consider, in arriving at a sensible interpretation, such extratextual factors as executive or administrative interpretations of the statute or legislative history."); *see, e.g., Ex parte Kuester*, 21 S.W.3d 264, 268 (Tex. Crim. App. 2000) ("So interpreting 'completion of the sentence' to mean serving the sentence in full, day-for-day, results in two possible consequences, one of which is absurd, and the other of which puts the
(continued...)

emergency clause."[10] TEX. GOV'T CODE § 311.023(4)-(5), (7). So, in the end, only four of the seven (4-5, 7) factors actually clash with textualism. This Court should take this opportunity to clarify how Section 311.023 fits within *Boykin*'s principle interpretation rule, including identifying the factors that are clearly part of a textual analysis.

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[9](...continued)
statute in conflict with other laws. We must conclude the phrase 'completion of the sentence' in Art. 42.08(b) is ambiguous."), *disapproved of by Ex parte Hale*, 117 S.W.3d 866 (Tex. Crim. App. 2003). *But see* Antonin Scalia & Bryan A. Garner *Reading Law: The Interpretation of Legal Texts* 322 ("Prior-Construction Cannon": "If a statute uses words or phrases that have already received authoritative construction by . . . . a responsible administrative agency, they are to be understood according to that construction.").

[10] *See, e.g., Reynolds v. State*, 423 S.W.3d 377, 382 (Tex. Crim. App. 2014) ("the 2005 amendments contain a transition clause specifying that the changes in the law 'apply to a person subject to Chapter 62,' and the amended version of Chapter 62 states that it applies to individuals who have reportable convictions or adjudications that occurred on or after September 1, 1970."); *Crabtree v. State*, 389 S.W.3d 820, 826 (Tex. Crim. App. 2012) ("Article 62.003's broad introductory phrase, 'For purposes of this chapter,' indicates the Legislature's intent that article 62.003 applies to the entire Texas sex offender registration program. This naturally includes the definitions found in article 62.001 containing the broad extra-jurisdictional 'catch-all' provisions requiring substantial similarity."); *see also* Antonin Scalia & Bryan A. Garner *Reading Law: The Interpretation of Legal Texts* 221 ("Title-and-Heading Canon": "The title and heading are permissible indicators of meaning.").

3. Consider the Experts: the Late Justice Scalia and Bryan A. Garner Approve of Texas' Textualist Doctrine.

Texas' current rule of law on statutory interpretation is supported by the late United States Supreme Court Justice Antonin Scalia and legal writing and linguistics expert Bryan A. Garner. In their treatise *Reading Law: The Interpretation of Legal Texts*, they unreservedly endorse pure textualism: "We look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters' extratextually derived purposes and the desirability of the fair readings' anticipated consequences." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* xxvii. They describe how the use of non-textual interpretive methods has negatively affected the judiciary and our government: "this neglect [of textualism] has impaired the predictability of legal dispositions, has led to unequal treatment of similarly situated litigants, has weakened our democratic process, and has distorted our system of governmental checks and balances." *Id.*; *see also Boykin*, 818 S.W.2d at 785 ("a third reason for focussing on the literal text is that the Legislature is constitutionally entitled to expect that the Judiciary will faithfully follow the specific text that was adopted.").

The rationale underlying Appellant's argument to abandon *Boykin*, Appellant's Brief at 61-78, proves the late Justice Scalia's and Garner's first and second points.

It presupposes that a different analytical construct will yield a different result. Additionally problematic is the capricious suggestion that courts should subjectively discern whether to rely on legislative history or set it aside. Both are antithetical to our justice system, which demands consistency and equal treatment under the law. "Variability in interpretation is a distemper." *Reading Law: The Interpretation of Legal Texts* 6. Under Appellant's proposition, appellate chaos would certainly and swiftly follow.

Finally, as to the other two interests noted by the late Justice Scalia and Garner, this Court has long recognized that adhering to the plain text is the only real way to accommodate our democratic government with its intentionally divided branches and separate powers. "[W]e seek to effectuate the 'collective' intent or purpose of the legislators who enacted the legislation. We do so because our state constitution assigns the law making function to the Legislature while assigning the law interpreting function to the Judiciary." *Boykin*, 818 S.W.2d at 785 (citing *Camacho v. State*, 765 S.W.2d 431, 433-34 (Tex. Crim. App. 1989) & Tex. Const. Art. II, § 1); *see also Ellison*, 201 S.W.3d at 722 ("And should the Legislature again disagree with our interpretation of the plain language of Section 3(a), it is certainly free to amend the statute."). There is no need to disturb the proper balance already in place.

4. *Boykin*'s Textualist Mandate Should be Strictly Applied.

Boykin instructs that the plain text is the starting point. And the law operates under the assumption that the plain text is clear, having been purposefully and carefully articulated.[11] However, all too often this Court finds ambiguity simply because the parties or justices on the courts of appeals disagree. More should be required, or all statutes can be considered ambiguous with the aid of artful and crafty practitioners who marshal competiting and facially sound arguments. *See Bays v. State*, 396 S.W.3d 580, 585 (Tex. Crim. App. 2013) ("Ambiguity exists when a statute may be understood by reasonably well-informed persons to have two or more different meanings."). *But see Bingham v. State*, 913 S.W.2d 208, 212 (Tex. Crim. App. 1995) (op. on reh'g) ("Construing a statute according to its plain import is not 'absurd' merely because members of this Court do not favor that construction."). Ambiguity should not be engineered or even reverse engineered through the preliminary consultation of legislative history or the elaborate conjuring of a statutory

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[11] *See, generally,* Tex. Const. Art. III, § 29 (requiring that all laws shall state: "Be it enacted by the Legislature of the State of Texas"), § 30 ("No law shall be passed, except by a bill . . . ."), § 35(a) ("No bill, (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject."), § 35(b) ("The rules of procedure of each house shall require that the subject of each bill be expressed in its title in a manner that gives the legislature and the public reasonable notice of that subject. The legislature is solely responsible for determining compliance with the rule."), § 38 (requiring that each bill must be signed by the presiding officer).

objective by judicial arbiters. It should be inherent. If otherwise, then, as the late Justice Scalia and Garner say, the mechanics of the law will be uncertain, inequity will result, and our judicial and legislative systems will be forever disrupted. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* xxvii. In addition to those problems, irregularity in the reading of criminal statutes jeopardizes the right of a defendant to have constitutionally adequate notice of the charged offense. *See State v. Zuniga*, 512 S.W.3d 902, 907 (Tex. Crim. App. 2017) (charging instruments track the statutory text, and that text is usually sufficient to provide notice); *see also* Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 342 (2012) ("there is an assumption of legislative supremacy but also the necessity of notice. It is a fundamental basis of jurisprudence that a person cannot be bound by a law of which he or she has no notice."); Connie Pfeiffer, *Methodological Stare Decisis: Different Approaches in the Lone Star State*, The Advocate, Summer 2015, at *8 (observing that legislative materials are "not as accessible to the general public, raising concerning about whether a statute interpreted by these guides gives fair notice of what is permissible and what is prohibited.").

"True Ambiguity" must be shown otherwise *Boykin* will suffer the "True

Death."[12] Fortunately, logic, workability, and the doctrine of *stare decisis* unquestionably demand maintaining *Boykin*.

More guidance should be given on what constitutes "true ambiguity" and the fundamentals involved in conducting a textualist analysis. The State Prosecuting Attorney has found the following two commentaries useful in understanding the complexities of identifying "true ambiguity" and the mode of conducting a plain-text analysis.

The late Justice Scalia and Garner explain actual ambiguity by distinguishing it from vagueness:

> there is a useful and real distinction between textual uncertainties that are the consequence of verbal ambiguity (conveying two very different senses, as when *table* could refer to either a piece of furniture or to a numerical chart) and those that are the consequences of verbal vagueness (as when *equal protection of the laws* can be given a narrow scope so narrow as to include only protection from injury, or so broad as to include equal access to governmental benefits). A word or phrase is ambiguous when the question is which of two or more meanings applies; it is vague when its unquestionable meaning has uncertain application to various factual situations.

Antonin Scalia & Bryan A. Garner *Reading Law: The Interpretation of Legal Texts* 32. *Compare with Boykin*, 818 S.W.2d at 789 (Miller, J., dissenting) (ambiguity in

[12] *True Blood* (HBO Television Broadcast 2008-14) (based on Charlaine Harris' Southern Vampire Mysteries Novel Series). "True Death" describes the death of a vampire who has experienced life after human death. *See, generally*, https://en.wikipedia.org/wiki/True_Blood.

a statute often is not apparent until the legislative history is researched and the true legislative intent is discerned).

Next, Professor Ron Beal, who has taught statutory construction at Baylor Law School for over twenty-five years, surveyed numerous Texas statutory construction cases and summarized what a textualist analysis should entail:

> in reality a court will hold a statute as clear and unambiguous or that it has a plain meaning after the court has: (1) given all words a reasonable, ordinary, technical, or legal meaning depending upon the context of the statute and with the aid of relevant dictionaries; (2) solely applied the canons of construction relating to discerning the facial construction of the words used and the common sense use and meaning of the words, phrases, and sections within the statute; and (3) the court has concluded there is only one reasonable interpretation of the statute's meaning that renders the entire statute to be effective by mandating rights, duties, obligations, and privileges that are feasible in execution.

Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 404.

This Court should enforce these principles, which, according to precedent and scholars, include the use of dictionaries and established canons of construction,[13] so the act of judging text can itself be unambiguous.

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[13] The authors cited above all agree that dictionaries and canons of construction inform a plain-text analysis; they also discuss a multitude of canons frequently invoked by this Court. *See, generally, Reading Law: The Interpretation of Legal Texts*; Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339.

PRAYER FOR RELIEF

The State Prosecuting Attorney prays that this Court continue to abide by *Boykin* and uniformly apply its originally intended strict textualist mandate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 3,239 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State Prosecuting Attorney's Pre-Submission Amicus Brief has been served on , *via* email or certified electronic service provider to:

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