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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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THE STATE OF TEXAS,
Appellant,
v.

TRENTON KYLE GREEN,
Appellee.

On Appeal from Cause Number 49202-A
In the 188th Judicial District Court of Gregg County, Texas and
Cause Number 06-20-00010-CR
In the Court of Appeals for the Sixth Judicial District of Texas.

BRIEF FOR THE STATE

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ORAL ARGUMENT REQUESTED

Identity of Judge, Parties, and Counsel

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NO. PD-1182-20

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

THE STATE OF TEXAS,……Appellant

v.

TRENTON KYLE GREEN,……...Appellee

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through its Criminal District Attorney for Gregg County, and respectfully presents to this Court its brief on the merits in the named cause.

STATEMENT OF THE CASE

Appellee was charged by indictment on July 25, 2019 in Cause Number 49202-A with one count of forgery. [CR-I-3]. On November 1, 2019, Appellee filed a motion to quash. [CR-I-8-9]. A hearing was held on that motion to quash on December 2, 2019. [RR-I-1]. On December 3, 2019 the trial court, with the Honorable J. Scott Novy presiding, granted Appellee's motion to quash with a written order. [CR-I-22]. Appellant

timely filed its notice of appeal on December 3, 2019. [CR-I-24-27]. On November 23, 2020, the Sixth Court of Appeals (hereafter Court of Appeals) affirmed the trial court ruling granting the motion to quash. *State v. Green,* 613 S.W.3d 571 (Tex. App.-Texarkana 2020, pet. granted.) On December 14, 2020 the State filed a timely petition for discretionary review to the Court of Criminal Appeals. On February 24, 2021, the Court of Criminal Appeals granted the State's petition for discretionary review and indicated oral argument would be permitted.

STATEMENT REGARDING ORAL ARGUMENT

This case involves important questions of statutory interpretation concerning the recent amendments to Section 32.21 of the Texas Penal Code, the forgery statute. Appellant believes the crucible of oral argument will help clarify the issues presented concerning how this statute is to now be interrupted and thus will help insure the proper functioning of this statute. Therefore Appellant requests oral argument.

ISSUES PRESENTED

I. Did the Court of Appeals err in holding that the value ladder provisions of Section 32.21(e-1) of the Texas Penal Code are mandatory in all cases where forgery was committed in order to obtain property or services.

II. Did the Court of Appeals err in holding that the defendant's purpose for committing the forgery offense is an element of the offense under Section 32.21(e) of the Texas Penal Code.

STATEMENT OF THE FACTS

On July 25, 2019 Appellee was charged by indictment in Cause Number 49202-A with the third degree felony offense of forgery. [CR-I-3]. The indictment specifically alleged Appellee committed this offense by making a false $20 bill. [CR-I-3]. The indictment did not allege that Appellant created this forged bill to obtain or attempt to obtain a property or service. [CR-I-3]. The indictment did not allege anything about Appellant obtaining a cigarette lighter with the forged bill. [CR-I-3].

On November 1, 2019 Appellee filed a motion to quash the indictment alleging that, given the value ladder provisions contained within Section 32.21(e-1) of the Texas Penal Code, the indictment in this case only alleged a Class C misdemeanor and thus the 188th Judicial District Court lacked jurisdiction to hear the case. [CR-I-8-9]. Appellee's motion to quash specifically alleged that the evidence at trial would show that Appellee

"allegedly attempted to pass a counterfeit twenty- dollar bill in exchange for goods at a local gas station." [CR-I-8].

On November 14, 2019 the State filed an answer to Appellee's motion to quash. [CR-I-14-20]. In the State's Answer the State argued that the value ladder provisions of Section 32.21(e-1) were a discretionary provision that would only be triggered if the State alleged an additional element that the offense was committed "to obtain or attempt to obtain a property or service" and that the State had not alleged that element, and therefore Section 32.21(e-1) was inapplicable in this case. [CR-I-14-17]. The State also asserted as an alternative argument that Appellee was asking for the trial court to look beyond the four corners of the indictment with its motion to quash and that this was inappropriate. [CR-I-17-18].

On December 2, 2019 a hearing was held on Appellee's motion to quash. [RR-I-1]. No live witnesses were called during that hearing. [RR-I-4-24]. At the hearing Appellee argued that any forging of money would have to be done to obtain property or services. [RR-I-10]. Appellee also argued that the State's interpretation of the forgery statute would mean the defense was not given adequate notice of the charges against him. [RR-I-12].

On December 3, 2019 the trial court granted Appellee's motion to quash. [CR-I-22]. That same day the State filed its notice of appeal. [CR-I-24-27].

On November 23, 2020 the Sixth Court of Appeals affirmed the trial ruling granting Appellee's motion to quash. *Green*, 613 S.W.3d at 576. The Court of Appeals specifically concluded that the value ladder provisions contained within Section 32.21(e-1) of the Texas Penal Code were not a discretionary provision that would only be applicable when specifically pled by the State but were instead a mandatory provision that had to be alleged in any forgery case where the offense was committed to obtain property or services. *Green*, 613 S.W.3d at 593.

The Court of Appeals likewise specifically held that the 2017 amendments to Section 32.21 established that for the State to prosecute a defendant under Section 32.21(d) or 32.21(e), the defendant's purpose for committing the forgery offense was an element of the offense that must be alleged in the charging instrument. *Green*, 613 S.W.3d at 596.

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in concluding that the value ladder provisions of Section 32.21(e-1) must be alleged in the charging instrument for any forgery case involving an attempt to obtain property or services.

Section 32.21(e-1) is instead a discretionary provision which can be alleged or not at the discretion of the prosecution. This is supported by the plain language of the statute which grants substantial charging discretion to prosecutors both within the forgery statute and in being able to elect between charging defendants with forgery or under other statutes and also by the absence of any explicit language within the statute mandating the use of Section 32.21(e-1).

Nor do any of the objections raised by the Court of Appeals to the State's interpretation of the statute provide any basis to reject the State's interpretation of the statute. The "subject to" language contained within Section 32.21(e-1) is not inconsistent with the State's interpretation of the statute and indeed is necessary for the State's interpretation to work. Nor does the State's interpretation of the statute violate any due process rights of the defendant through the in pari materia doctrine as the legislature wrote Section 32.21 so that the in pari materia doctrine would not apply. The State's interpretation also does not render the statute impermissibly vague as such a grant of authority by the legislature in this case is comparable to similar grants of prosecutorial discretion for other statutes. And the State's interpretation does not lead to absurd results. Quite the opposite in fact as the Court of Appeals' interpretation would lead to a bizarre result where

small dollar check forgers could still be subject to being prosecuted as felons but counterfeiters could not despite the fact that the legislature clearly regards counterfeiting as a more serious offense than check forging.

In the alternative even if the Court of Appeals was correct in its determination as to Section 32.21(e-1), the indictment in this case still alleged a valid offense under Section 32.21(e) and thus should not have been quashed. There was no justification for the Court of Appeals to write an additional element concerning a defendant's motive into Section 32.21(e) as that provision does not constitute an enhancement provision for Section 32.21(e-1) and can function as written without the courts rewriting the statute.

ARGUMENT

I. The Court of Appeals erred by finding the value ladder provisions of the forgery statute to be mandatory in all cases where forgery was committed in order to obtain property or services.

This case is primarily a case about statutory interpretation and specifically about the applicability of Section 32.21(e-1), the so called value ladder provisions, that were added to the forgery statute as part of the 2017 amendments. The Court of Appeals held that these provisions are mandatory and must be alleged by the State in any case where the forgery

was committed in order to obtain property or services. *Green*, 613 S.W.3d at 593. The State disputes that interpretation and believes the plain language of the statute makes clear that the value ladder provisions are meant to be a discretionary provision that can be invoked or not at the discretion of the prosecution.

A. Rules of statutory interpretation

In interpreting a statute, a court shall diligently attempt to ascertain the legislative intent. TEX. GOV'T CODE §312.005 (West 2013). This requires a reviewing court to focus their attention on the literal text of the statute in question. *Lang v. State,* 561 S.W.3d 174, 180 (Tex. Crim. App. 2018). Moreover, if the meaning of the statutory text should have been plain to the legislators who voted for it, then reviewing courts are too ordinarily give effect to the plain meaning. *Id.* It is only when the statute's language is ambiguous or when application of the text's plain meaning would lead to absurd results that a court may consider extra-textual factors in evaluating the statute. *Id.*

B. The plain language of the statute supports the State's interpretation.

The plain language of Section 32.21 makes clear that Section 32.21(e-1) is a discretionary provision that can be invoked or not as part of the charging decision of the prosecution.

To begin with there is the fact that Section 32.21(e-1) is in fact a ladder. It lowers the potential punishment a defendant faces in certain cases but also has the potential to greatly raise a defendant's liability (all the way up to a first degree felony) in other cases. If the legislature had simply intended to prevent prosecutors from being able to charge small dollar value forgeries as felonies then they would hardly fathom the value ladder so as to actually increase the potential punishment for forgery in some cases. That they instead created a provision that expands how the State can charge forgery offenses suggests there intent was to give the State more options on how to prosecute these type of cases.

And even more illustrative is the fact that the legislature kept Section 32.21(g) in the statute when they enacted the 2017 amendments. Section 32.21(g) notably holds that any conduct that could be prosecuted under the forgery statute or another statute can lawfully be prosecuted under either statute. Such a provision also clearly belies the idea that the 2017

amendments to Section 32.21 were designed to restrict the State's charging authority or keep the State from being able to charge small dollar forgers as felons since if that was the case the legislature would hardly have kept Section 32.21(g), a provision that would clearly frustrate such goals by giving the State opportunity to charge small dollar forgery offenders outside of the forgery statute, in the statute. Thus the only reason to keep Section 32.21(g) within the forgery statute is because the legislature always intended the State to have broad discretion in how to charge forgery offenders.

It is also significant that there is no explicit language in the statute mandating the use of the value ladder, and this despite the legislature having numerous options available to it if it had intended to make the value ladder provisions mandatory in all forgery offenses where a defendant sought to obtain property or services.

If the legislature had wanted to mandate the use of the value ladder, it certainly could have simply made those provisions explicitly mandatory by using directive language in the statute itself. An example of such directive statutory language is with Section 521.451(c) of the Texas Transportation Code where the statute explicitly holds that any conduct involving possessing a fake driver's license that could be prosecuted under either Section 521.451 of the Texas Transportation Code (a Class A

misdemeanor) or under Section 106.07 of the Texas Alcoholic Beverage Code (a Class C misdemeanor) must be prosecuted under Section 106.07. Alternatively, the legislature could have structured the forgery statute like Section 31.03 (the theft statute) where the punishment level for theft offenses is based on the value of the property stolen with special provisions included in the statute for special cases or for when the value of the item stolen cannot be ascertained. And of course the legislature could have simply made the value ladder provisions of Section 32.21(e-1) a special issue to be raised by the defense similar to how under Section 19.02(d) of the Penal Code, the defense can raise the issue of sudden passion in a murder case to reduce the punishment level to that of a second degree felony.

Thus it is clear the legislature had numerous options if it wanted the value ladder provisions to be mandatory, and yet it exercised none of these options. There is no directive language in Section 32.21 telling prosecutors they must prosecute cases under Section 32.21(e-1). Nor does Section 32.21(e-1) establish the baseline punishment level for forgery offenses as Section 32.21 (c), (d), and (e) all allege complete forgery offenses with punishment regimens separate from Section 32.21(e-1). And there certainly isn't any language in Section 32.21 similar to the language of Section 19.02(d) that states that the defense may raise the issue of the value of the

property/service to be obtained to lower the punishment level. (And of course the fact that the value ladder provisions of Section 32.21(e-1) extend in both directions also argues against it being meant to be a special defensive issue as if it was meant to be a defensive issue then it would hardly include the ability to enhance a forgery offense to a higher offense level as Section 32.21(e-1) does.)

It must be presumed the legislature knows how to draft statutes. Therefore the decision not to explicitly mandate the use of the value ladder within the statute must be read as a deliberate choice by the legislature, and when that choice is considered in conjunction with the continued existence of Section 32.21(g) within the forgery statute (a provision that only exists to give the State very broad jurisdiction in how to prosecute this kind of conduct), the only logical conclusion from the plain language of the statute is that the legislature intended Section 32.21(e-1) to be a provision that prosecutors have the discretion to plead or not as is appropriate on each individual case.

C. The "subject to" language contained within Section 32.21(e-1) is not inconsistent with the State's interpretation of the statute.

Now the Court of Appeals justified it's ruling by arguing that the language "subject to Subsection (e-1)" contained within Sections 32.21(d)

and (e) establishes that Section 32.21(e-1) controls over Sections 32.21(d) and (e). *Green,* 613 S.W.3d at 581-583. That is true but immaterial. Of course Section 32.21(e-1) controls over Sections 32.21(d) and (e) but only when Section 32.21(e-1) is actually invoked. Thus the "subject to" language is not at all inconsistent with the State's interpretation of the statute. That language merely establishes that when the State alleges the additional element contained within Section 32.21(e-1) (that the offense was committed in order to obtain property or services) then the offense is governed by the punishment range laid out in Section 32.21(e-1) even if the items being forged could otherwise have been prosecuted under Section 32.21(d) or (e).

Indeed not only is the "subject to" language not adverse to the State's interpretation of the statute, but the "subject to" language is actually essential for making the State's interpretation of the statute work as without that language in the statute there would no way to know whenever the State alleged a forgery offense that could be prosecuted under both Section 32.21(e-1) and 32.21 (d) or (e) which punishment range actually controlled. Absent that language in the statute any defendant charged under conduct that constituted a violation of both Section 32.21(e-1) and 32.21(d) or (e) would be able to argue that they did not know what the punishment range for the

offense was and thus could likely strike down charging instruments as a defective pleading. Thus far from invalidating the State's interpretation of the statute, the "subject to" language is perfectly consistent with the State's interpretation of the statute as it is what makes the State's interpretation workable.

D. A defendant has no due process right to be charged with a lesser offense under the forgery statute.

The Court of Appeals also argued that allowing the State to choose between charging a defendant between Section 32.21(e) and Section 32.21(e-1) would violate a defendant's due process right to be charged with a lesser offense. *Green,* 613 S.W.3d at 585. To support this argument the Court of Appeals cited to the Court of Criminal Appeals opinion in the *Azeez* case. See *Green,* 613 S.W.3d at 585; *Azeez v. State,* 248 S.W.3d 182 (Tex. Crim. App. 2008). Unfortunately in doing so the Court of Appeals misinterpreted *Azeez* as nothing in *Azeez* established any sort of generalized right to be charged with a lesser offense. What *Azeez* actually stated was that a defendant had a due process right to be prosecuted under a special statute when that statute was *in pari materia* with a broader statute and those two statutes irreconcilably conflict. *Id.* at 192. Thus the due process right

established in *Azeez* is specifically linked to the *in pari materia* doctrine, and that doctrine is inapplicable to the forgery.

As a threshold matter the State questions whether the in pari materia doctrine can ever apply when it comes to dueling subsections within the same statutory section. The in pari materia doctrine arises "where one statute deals with a subject in comprehensive terms and another deals with a portion of the same subject in a more definite way." *Jones v. State,* 396 S.W.3d 558, 561 (Tex. Crim. App. 2013). Thus it was always meant to address conflicting statutes not conflicting subsections of the same statute (which necessarily are going to address the same general subject.) Thus the State believes the in pari materia doctrine is inapplicable as to provisions within the same statutory section.

However, even assuming in arguendo that the doctrine of in pari materia can be applied within a statutory section and not just too conflicting statutes, it still would not be applicable to the forgery statute. The in pari materia doctrine is meant to serve the legislative intent. *Jones,* 396 S.W.3d at 561. Accordingly, when there is language in a statute asserting that when an offense under the statute is also an offense under the other statute, the conduct can be prosecuted under either statute, such language establishes clear legislative intent to allow prosecution under either section regardless of

any conflict between them regardless of the in pari materia doctrine and said doctrine is inapplicable. *Jones,* 396 S.W.3d at 563.

The forgery statute contains such language negating the in pari materia doctrine as Section 32.21(g) states that when conduct that constitutes an offense under the forgery statute is also an offense under other law, it can be prosecuted under either law. Thus the legislature has determined that the in pari materia doctrine does not apply for forgery cases.

The due process right established in *Azeez* is a right under the in pari materia doctrine. Accordingly, since the in pari materia doctrine is inapplicable in forgery cases the *Azeez* right to be prosecuted by the more specific statute is inapplicable in this matter and there is no due process bar to a defendant being prosecuted under either Section 32.01(e-1) or Section 32.01(e) or (d).

E. The State's interpretation would not render the statute impermissibly vague.

The Court of Appeals also argued that allowing the State to be able to choose between charging a defendant under Section 32.21(e) or 32.21(e-1) would render the statute impermissibly vague. *Green,* 613 S.W.3d at 585-586. The Court of Appeals' argument seems to be based not on a claim that the State's interpretation would make it unclear what conduct was being

proscribed but rather that it gives prosecutor's too much discretionary authority. This Honorable Court rejected a similar argument in the *Earls* case where it was held that the theft statute having several different ways it could be alleged (some of which made the offense a felony rather than a misdemeanor) did not render it impermissibly vague so long as the proscribed conduct was described so as to give the defendant fair notice that they had violated the statute. See *Earls v. State,* 707 S.W.2d 82, 86-87 (Tex. Crim. App. 1986).

Similarly, a defendant who flees from a police officer in a vehicle can be lawfully charged with either the third degree felony offense of Evading Arrest/Detention under Section 38.04(b)(2)(A) of the Texas Penal Code or as the Class B misdemeanor offense of Fleeing or Attempting to Elude Police Officer under Section 545.421 of the Texas Transportation Code, and this Honorable Court has upheld the State having the discretion to choose which of those statutes to prosecute a defendant under despite a substantial difference in the potential punishment range. See *Alejos v. State,* 555 S.W.2d 444, 450-451 (Tex. Crim. App. 1977).

If giving prosecutors the discretion to elect between a misdemeanor and a felony as to thieves and fleeing defendants is permissible, it is difficult to see a compelling legal justification for why it would be impermissible to

give prosecutors similar discretion as to forgery offenses, and thus there is no justification to conclude that the State's interpretation of the forgery statute renders that statute impermissible vague. The indictment described a complete offense under Section 32.21(e) in language that made clear the prescribed conduct, and thus there was no basis to quash the indictment for vagueness in this case.

F. The State's interpretation does not lead to absurd results.

The Court of Appeals also argued that the State's interpretation would lead to unjust and unreasonable results after which the Court of Appeals described at length the additional burdens a defendant would face if they are charged with a felony rather than a misdemeanor. *Green,* 613 S.W.3d at 587-589. In doing so the Court of Appeals made a policy argument rather than a legal argument and thus improperly invaded the province of the legislature as it is a proper exercise of legislative authority to choose whether or not they want to give prosecutors broad discretion in how to charge an offense.

Sometimes the legislature gives prosecutor's very narrow discretion (as with fake driver's licenses where prosecutors are only permitted to charge offenders with a Class C misdemeanor offense under Section 106.07 of the Alcoholic Beverage Code) and sometimes the legislature's grants

prosecutors very broad discretion as seen with most charging enhancements which are entirely at the discretion of a prosecutor to allege and which can theoretically turn shoplifting a $2 candy bar (an offense that would normally be a Class C misdemeanor in accordance with Section 31.03(e)(1) of the Texas Penal Code) into an offense punishable by up to 20 years in prison if the defendant has the requisite prior convictions and the prosecutor chooses to allege the enhancements.) See TEX. PENAL CODE §31.03(e)(4)(d) (West 2019)(holding that theft of property of a value less than $2,500 is a state jail felony if the defendant has two or more prior theft convictions); TEX. PENAL CODE §12.425(b)(West 2019)(holding that a defendant charged with a state jail felony can be punished as a second degree felony if the defendant has two or more sequential non-state jail felonies.) But regardless it is the legislature's prerogative to choose to give prosecutor's that discretion, and if the legislature does decide to grant prosecutor's broad discretion then that legislative determination should not be overruled by the courts. The remedy to prosecutors allegedly overcharging is at the ballot box not through court's rewriting the laws to strip prosecutors of the authority they have been lawfully granted by the legislative branch.

Nor is the Court of Appeals' conclusion that the legislature could not have intended for some forgery defendants to be subject to being charged as

felons at all persuasive given that the forgery statute has long allowed defendants charged with possessing forged money to be charged as felons. Clearly pre-2017 the legislature did not see anything wrong in allowing certain forgery defendants to face felony charges and in the absence of explicit language overturning the prior statutory framework there is no basis to conclude that the legislature has changed its view on that point. Indeed the continued existence of Sections 32.21(d) which makes the forgery of certain types of documents a state jail felony and of Section 32.21(e) which makes the forgery of other types of documents a third degree felony, makes it unquestionable that even as of the 2017 amendments to the statute, the legislature still believes that certain acts of forgery deserve to be punished as felonies, and thus it is hardly absurd to believe the legislature intended to give the State the discretion in certain cases to charge forgery defendants with either a misdemeanor or a felony when the statute explicitly allows for certain categories of forgery offenders to be charged with a felony.

It is also notable that even under the Court of Appeals' interpretation of the statute, many forgery defendants alleged to have committed small dollar forgery offenses to obtain property or service could still easily be charged with a felony. As one instance any defendant that possesses a forged check will still be subject to prosecution as a state jail felon under

Section 32.51 of the Texas Penal Code (fraudulent use or possession of identifying information) since forging a check necessarily means using someone else's name and financial account information and thus will always also constitute a violation of Section 32.51. Nor is there any question that it would be entirely lawful for the State to choose to prosecute a small dollar check forgery offense under Section 32.51 rather than under Section 32.21(e-1) because as previously discussed Section 32.21(g) explicitly gives prosecutors the authority to prosecute a forgery offense under any other statute that has also been violated. Therefore even under the Court of Appeals' interpretation of the forgery statute, the State could still charge a forger of a $10 check as a felon and that would be perfectly legal.

Thus the only thing the Court of Appeals' interpretation of the statute accomplishes is to create a bizarre variance between how check forgers are treated and how counterfeiters are cheated since under the Court of Appeals' interpretation a small dollar check forger could lawfully be charged with either a misdemeanor or a felony while a small dollar counterfeiter could only be charged with a misdemeanor, and that cannot be what the legislature intended.

The continued presence of forgery of money within Section 32.21(e) shows that the legislature considers the forgery of money to be a special evil

that warrants heightened punishment. Moreover, the fact that counterfeit currency continues to be included within Section 32.21(e) (where it is penalized as a third degree felony) whereas forged checks continued to be listed within Section 32.21(d) (whether they are only punished as a state jail felony), shows that even as of the 2017 amendments, the legislature still considers counterfeiting currency to be a greater evil than forging checks, and if so the legislature would hardly be likely to amend the statute in a way that gave the State greater discretion in how to prosecute check forgers than it had to prosecute counterfeiters.

Nor is there any equitable reason to treat counterfeiters more gently than check forgers. Indeed if anything the opposite is true as counterfeit currency is arguably a greater evil than check forging since when counterfeit money gets into circulation it can cause considerable difficulty to innocent bystanders who acquire the counterfeit bills in good faith and then get into trouble with the law when they attempt to pass the bills without realizing they are counterfeit.

Thus far from allowing unjust and unreasonable results, the State's interpretation of the statute is actually the most rational interpretation since it insures the State has the same level of prosecutorial discretion regarding both the forgery of checks and the forgery of currency whereas the Court of

Appeals' interpretation results in a bizarre legal framework where the State has substantially broader discretion in prosecuting the forgery of checks and other financial documents than it has in prosecuting the forgery of currency even though the legislature has clearly signaled that it considers counterfeiting currency to be a more serious offense than forging checks.

Accordingly, since the State's interpretation of the statute is consistent with the plain language of the statute, does not violate any defendant's due process rights, is not impermissibly vague, does not lead to absurd results, and actually avoids the absurd results that would be enabled by the Court of Appeals' interpretation of the statute, it is the State's interpretation that should be upheld. Section 32.21(e-1) is a discretionary provision that can be invoked or not at the discretion of the prosecution, and in this case since the prosecution elected not to invoke that provision the offense was properly before the trial court as a third degree felony and the indictment should not have been quashed.

II. The Court of Appeals erred by holding that the defendant's purpose for committing the forgery offense is an element of the offense under Section 32.21(e) of the Texas Penal Code.

In the alternative even assuming in arguendo that the Court of Appeals was correct in concluding that the value ladder provisions of Section 32.21(e-1) are mandatory for any forgery offense that was committed to

obtain property or services, the Court of Appeals still committed reversible error by affirming the trial court's ruling granting Appellee's motion to quash because the indictment as submitted described a complete offense under Section 32.21(e) of the Texas Penal Code and thus should have been permitted to proceed to trial.

The Court of Appeals opinion acknowledged that the indictment in this case did track the statutory text of the forgery offense under Section 32.21(e). *Green,* 613 S.W.3d at 596. Nevertheless the Court of Appeals still upheld the trial court's decision granting Appellee's motion to quash on the grounds that the 2017 amendments to Section 32.21 made the defendant's purpose for committing the forgery offense "a core criminal offense 'element'" and thus the Court of Appeals concluded that even if the State was prosecuting the defendant under Section 32.21(e), the State would still have to allege in the indictment the reason the defendant committed the forgery offense in order to state a complete offense. *Green,* 613 S.W.3d at 596

Such a ruling was plainly improper. Nothing in the language of Section 32.21(e) requires the State to allege the defendant's reason for committing a forgery offense under that subsection, and it is certainly not necessary to write such an element into the statute to harmonize it with other

sections of the statute. Section 32.21(e) would function perfectly well as a statute for penalizing all forgery offenses involving money, securities, stamps, and governmental records done for purposes other than to obtain property or services without requiring the State to additionally prove what the defendant's motive for possessing the forged documents was.

There are also logical reasons why the legislature might choose to impose an additional element of showing the reason the offense was committed for offenses pled under Section 32.21(e-1) but not require that same motive element for forgery offenses prosecuted under the other subsections of the forgery statute. Obviously proving a defendant committed a forgery in order to obtain property or services is relatively trivial. In most cases simply showing that the defendant attempted to pass the forged instrument (or possessed it on their person while at a commercial establishment) would be sufficient to show that intent. Thus inserting such an element into Section 32.21(e-1) does not place a particularly heavy burden the State. Whereas requiring the State to be able to prove a defendant's motive behind committing a forgery offense when the offense is not clearly done to obtain property or services is a much more daunting prospect and thus inserting such an element into the forgery statute would be to put a very heavy burden upon the State and indeed might well render

Sections 32.21(d) and (e) nullities, as it is easy to envision scenarios where the State captures defendant's in possession of large quantities of forged documents but does not know exactly what they intended to do with those documents and thus would not be able to successfully prosecute the defendant's under the Court of Appeals' interpretation.

Nor is much gained by added that additional motive element to the State's burden. The State is already required to prove the forgery was done in order to harm or defraud another which already protects an innocent holder of forged documents. See TEX. PENAL CODE ANN. §32.21(b) West (2020). And a defendant hardly needs to know the specific motive the State believes he had for committing the offense to have notice that he is being prosecuted under Section 32.21(e) rather than Section 32.21(e-1): the absence of the language that the offense was committed in order to "obtain or attempt to obtain a property or service" gives a defendant full notice they are not being prosecuted under Section 32.21(e-1). And it can hardly be said that requiring the State to prove the defendant's motive beyond a reasonable doubt would be a typical statutory provision. It is in fact exceedingly rare for the State to be required to prove motive as an element of a criminal offense. Instead motive is typically an ancillary issue that the State can attempt to prove under Rule of Evidence 404(b) to try and support their

case-in-chief but which the State is rarely required to actually prove beyond a reasonable doubt.

Thus given the difficulty in proving a defendant's motive beyond a reasonable doubt in cases not involving acquiring property or services and the de minimis value of requiring the State to prove a defendant's motive in such cases, it would be perfectly logical for the legislature to decide not to require the State to prove a defendant's motive for committing forgery offenses alleged under Section 32.21(e).

It is also significant that Section 32.21(e) has never required the State to allege the defendant's motive for committing the forgery offense. It seems decidedly improbably that the legislature would elect to change that and place such a new and heavy evidentiary burden on the State without making it explicit within the statute. Nor is the State aware of any legislative history connected to this statute that suggests that any member of the legislature thought they were adding a motive element into Section 32.21(e) when they amended the statute. Thus it seems clear the legislature did not intend to require the State to prove the defendant's motive in forgery cases where the offense was committed for a reason other than obtaining property or services, and that policy decision by the legislature should be respected.

The Court of Appeals now attempts to justify its ruling inserting an additional element into Section 32.21(e) based on the *Apprendi* decision which states that anything (other than a prior conviction) that enhances a defendant's punishment beyond the proscribed statutory range must be proven to the jury beyond a reasonable doubt. *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000). However, by the Court of Appeals' own logic, Section 32.21(e) is a separate offense than Section 32.21(e-1), proscribing different conduct than Section 32.21(e-1). *Green,* 631 S.W.3d at 596. If Section 32.21(e) proscribes different conduct than Section 32.21(e-1) then logically Section 32.21(e) is not an enhancement provision for Section 32.21(e-1), and if Section 32.21(e) is not an enhancement of Section 32.21(e-1) but rather an offense in its own right then *Apprendi* is inapplicable to any analysis of charges brought under Section 32.21(e). Section 32.21(e) already alleges a complete offense as written, and thus there is no need to also allege the defendant's purpose for committing a forgery offense in order to properly charge a defendant under Section 32.21(e).

By writing an additional element into Section 32.21(e) (and also implicitly Section 32.21(d) since the same logic would control for that subsection as well), the Court of Appeals rewrote the forgery statute. This

was improper. It is one thing to reform a statute when it is necessary to do so to reconcile an irreconcilable conflict with another statute or to make the statute function, but that was not the case here. Section 32.21(e) is a perfectly functioning statute without writing the additional element as to what the defendant's motive was for possessing the forged documents into that provision. Accordingly, there was no need to rewrite the statute in order to save it, and as such there was no justification for Court of Appeals to write an additional element into Section 32.21(e). Courts cannot normally broaden the terms of a statute without running afoul of the prohibition against judicial legislation. See *Sanchez v. State,* 182 S.W.3d 34, 41 (Tex. App.-San Antonio 2005, *aff'd,* 209 S.W.3d 117, 125 (Tex. Crim. App. 2006). Thus the Court of Appeals' holding which added an additional element into Section 32.21(e) was an improper usurpation of the legislative prerogative and should not reversed.

Absent the additional element the Court of Appeals improperly wrote into Section 32.21(e), the charging instrument for this case alleged a complete offense under Section 32.21(e). As such it was a valid charging instrument and should not have been quashed. Therefore the Court of Appeals erred in affirming the trial court's order granting the motion to quash.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State prays that this Honorable Court reverse the judgment of the Court of Appeals and reverse the trial court's order granting the motion to quash.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I, Brendan Wyatt Guy, Assistant Criminal District Attorney, Gregg County, Texas, certify that the number of words in Appellant's Brief submitted on March 17, 2021, excluding those matters listed in Rule 9.4(i)(3) is 6,007.

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CERTIFICATE OF SERVICE

I, Brendan Wyatt Guy, Assistant Criminal District Attorney, Gregg County, Texas, certify that a copy of the foregoing brief was sent by electronic mail to Mr. Vincent Botto, Attorney for Appellee, Trenton Kyle Green, at vchrisbottolaw@gmail.com and by United States mail to Ms. Stacy M. Soule, P. O. Box 13046, Capitol Station, Austin, Texas 78711, State Prosecuting Attorney, on this the 17th day of March, 2021.

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