NO. D1DC14-100139

STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
VS.	§	OF TRAVIS COUNTY
	§	
JAMES RICHARD "RICK" PERRY	§	390TH JUDICIAL DISTRICT

THIRD MOTION TO QUASH AND SET ASIDE THE INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, JAMES RICHARD "RICK" PERRY, by and through his counsel of record, and pursuant to the Texas Code of Criminal Procedure, the Constitution of the United States, and the Texas Constitution, presents this Third Motion To Quash And Set Aside The Indictment, and would respectfully show this Honorable Court the following:

I.

NATURE OF RELIEF SOUGHT

The Court's January 27, 2015 orders addressing Governor Perry's prior pleadings reflect that the Court has serious, well-founded concerns regarding the sufficiency of both counts of the indictment. Governor Perry shares those concerns, and has additional concerns which have not previously been raised. Accordingly, in order to afford the Court with the opportunity to quash the indictment and/or to require the State to amend both counts,[1] this motion is respectfully submitted.[2]

II.

LEGAL OVERVIEW

All citizens accused of any crime have the right to adequate notice of the specific charges

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[1] Such an order might in fact "moot" the need for an appeal from the Court's January 27, 2015, order denying Governor Perry's writ of habeas corpus.

[2] This is not a concession that Governor Perry believes that the State can successfully amend Count I to allege an offense, or Count II to negate the statutory exception.

under the Sixth Amendment to the Constitution of the United States and article I, Section 10 of the Texas Constitution.[3] These constitutional guarantees require a defendant to be given notice of the "nature and cause" of the accusation against him so that he may prepare a defense, and plead an acquittal or conviction in bar of further prosecutions for the same offense.[4] The requirement of notice "with sufficient clarity and detail" is designed to "enable the defendant to anticipate the State's evidence and prepare a proper defense to it."[5] "[T]he accused is not required to anticipate any and all variant facts the State might hypothetically seek to establish."[6]

The Texas Code of Criminal Procedure implements and supplements these constitutional requirements and provides guidelines by which to measure the sufficiency of an indictment. For instance, under Article 21.03, "[e]verything should be stated in an indictment which is necessary to be proved." Article 21.04 requires that the "certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it as a bar of any prosecution for the same offense."[7] And Article 21.11 states that "[a]n indictment shall be deemed sufficient which charges

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[3] *In re Oliver*, 333 U.S. 257, 273 (1948); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Moff v. State*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004); *Garcia v. State*, 981 S.W.2d 683, 685 (Tex. Crim. App. 1998).

[4] *Hamling v. United States*, 418 U.S. 87, 117 (1974); *Russell v. United States*, 369 U.S. 749, 763-764 (1962); *Garcia v. State*, 981 S.W.2d at 686 (Meyers, J., concurring); *Moore v. State*, 473 S.W.3d 523, 523 (Tex. Crim. App. 1971).

[5] *Garcia v. State*, 981 S.W.2d at 685 (citing *Eastep v. State*, 941 S.W.2d 130, 132 (Tex. Crim. App. 1997)).

[6] *Brasfield v. State*, 600 S.W.2d 288, 295 (Tex. Crim. App. 1980), *overruled on other grounds by Janecka v. State*, 739 S.W.2d 813, 819 (Tex. Crim. App. 1987); *Drumm v. State*, 560 S.W.2d 944, 947 (Tex. Crim. App. 1977).

[7] This statutory requirement of "certainty" is "distinct from, and independent of, the constitutional requirement of adequate notice." *Garcia v. State*, 981 S.W.2d at 685 n.3 (citing G. Dix & R. Dawson, *Texas Criminal Practice and Procedure* § 20.104 (1995); 2 W. Lafave & J. Israel, *Criminal Procedure* § 19.2(b) at 445-446 (1984).

the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged . . . . "

Under Article 27.08 of the Code of Criminal Procedure, exceptions to the substance of an indictment can be raised where "it does not appear therefrom that an offense against the law was committed by the defendant" and "it contains matter which is a legal defense or bar to the prosecution." Defects of form can be raised under Article 27.09 of the Code of Criminal Procedure, although a defect of form should not render an indictment insufficient unless it "prejudice[s] the substantial rights of the defendant." *See* Article 21.19. Defects of substance and form can result in a dismissal of an indictment or require an amendment of the indictment. *See, e.g.*, Articles 28.07 and 28.09 to 28.11 of the Texas Code of Criminal Procedure. The issue of "[w]hether an indictment fails to charge an offense at all is an entirely different issue from whether the indictment fails to provide adequate notice."[8]

III.

LEGAL GROUNDS FOR RELIEF

Governor Perry asserts that the deficiencies set forth below as to both counts constitute defects of form and substance under Articles 21.02, 27.08, and 27.09 of the Texas Code of Criminal Procedure which operate to "prejudice his substantial rights" under Article 21.19 of the Texas Code of Criminal Procedure. These defects of form and substance also deprive him of his constitutional rights to an indictment, and to adequate notice and certainty of the offense to allow him to prepare a defense and to plead a judgment herein as a bar to future proceedings. Both counts must be

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[8] *Curry v. State*, 30 S.W.3d 394, 399 (Tex. Crim. App. 2000); *Olurebi v. State*, 870 S.W.2d 58, 62 n.5 (Tex. Crim. App. 1994).

quashed and set aside.

A. Count I Should Be Quashed.

Governor Perry is indicted in Count I for "abuse of official capacity" under Section 39.02(a)(2) of the Texas Penal Code. Governor Perry asserts that Count I fails to allege an offense, as a matter of law,[9] in that "it does not appear [] that an offense against the law was committed by the defendant," "contains matter which is a legal defense or bar to the prosecution," and fails to provide him with adequate notice to prepare a defense and plead a judgment herein as bar to further proceedings in that:

> **a.** Count I is vague, uncertain and indefinite and fails to allege any facts or act reflecting the gravamen of the alleged offense and the manner and means of the commission of any offense,[10] in that it fails to allege:
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> > 1. Under what agreement, if any, Governor Perry held the property in question, and the parties to that agreement;[11]
> >
> > 2. How Governor Perry allegedly dealt with that property contrary to such agreement (i.e., whether by exercise of his veto power or by some other act or omission); or
> >
> > 3. How Governor Perry allegedly dealt with such property contrary to his oath

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[9] *See* footnote 9 at page 14 of the Court's Order denying the first motion to quash.

[10] *See* pages 14-17 of the Court's Order denying the first motion to quash and *State v. Moff*, 154 S.W.3d 599 (Tex. Crim. App. 2004).

[11] "An agreement is a harmonious understanding or an arrangement as between two or more parties, as to a course of action." *Gonzalez v. State*, 954 S.W.2d 98, 104 (Tex. App.—San Antonio 1998, no pet) (citing *Bynum v. State*, 767 S.W.2d 769, 774-775 (Tex. Crim. App. 1989). "The agreement need not be a written contract, but may be only an understanding or arrangement as to a particular course of action." *Merryman v. State*, 391 S.W.3d 261, 270 (Tex. App.—San Antonio 2012, pet. ref'd). *Id.* "The state is only required to prove that the fiduciary failed to apply the funds according to the terms of the agreement; the actual manner in which the fiduciary applied the funds is immaterial." *Id.* Accordingly, Count I fails to allege sufficient facts to identify the existence of any "agreement" under which the Governor allegedly held monies, the parties to that alleged agreement, or the terms of that alleged agreement.

of office (i.e., by exercise of his veto power or by some other act or omission).[12]

b. Count 1 fails to allege an offense as a matter of law because it fails to allege that Governor Perry obtained physical control of state property and used it for personal, non-governmental purposes, which is the intent behind the statute.[13]

c. Assuming that Governor Perry's act of vetoing the line item appropriation for the Public Integrity Unit (PIU)[14] is in fact the act that constitutes the gravamen of the offense which is attempted to be alleged in Count I, the act of vetoing a line item appropriation is not conduct, as a matter of law, that constitutes an offense under Section 39.02(a)(2) of the Texas Penal Code, because:

1. Governor Perry's act of vetoing the line item appropriation for the PIU is conduct that, as a matter of law, cannot constitute a "misuse" of any money;

2. It is legally impossible for Governor Perry to have "misused" any money because, as a matter of law, he never had "custody" or "possession" -- that is,

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[12] Governor Perry's "oath of office" consists of two separate oaths under article XVI, Section 1(a) and 1(c) of the Texas Constitution. The indictment fails to allege any facts which provide Governor Perry with any notice of which oath he allegedly violated and how he allegedly violated it, thereby providing him with inadequate notice to prepare a defense or to plead a judgment as a plea in bar to any further prosecution.

[13] There is a dearth of case law addressing Section 39.02(a). However, since Section 39.02(a) is identical to the former "official misconduct" statute enacted as Section 39.01 in the 1974 Texas Penal Code, and the case law interpreting the former statute can be relied upon to interpret Section 39.02(a).

The case law reflects that prosecutions under Section 39.02(a)(2) dealing with "property" relate to instances where the defendant obtained physical control of state property and used it for personal, non-governmental purposes. *See e.g., Talamantez v. State*, 829 S.W.2d 174 (Tex. Crim. App. 1992) (county commissioner used county equipment, a bulldozer and maintainer, to clear brush, shape a creek and tank dam, on real property belonging to members of his family). *Talamantez* reflects the historical development of predecessor statutes, noting that proceedings regarding "official misconduct" are regarded as *sui generis*. 829 S.W.2d at 179.

[14] This assertion is made without waiver of Governor Perry's prior assertions that a legislative veto is privileged under Texas's Speech or Debate Clause and that, since this veto relates to an essential element of the offense, Count I must be dismissed and the prosecution barred, or that Governor Perry is absolutely immune from prosecution for his legislative acts.

"actual care, custody, control, or management" -- of any money;[15]

3. It is legally impossible, as a matter of law, for Governor Perry to have "dealt with any monies" he did not knowingly obtain or receive because he did not *voluntarily* possess[16] any such monies;

4. As a matter of law, there is no "agreement" under which Governor Perry "held" (i.e., voluntarily possessed) any monies which had been appropriated by the Texas Legislature;

5. As a matter of law, Governor Perry's oath of office does not prescribe the manner or method by which he has to deal with any bill submitted to him by the Texas Legislature, let alone how he must vote on any line item appropriation (even disregarding his constitutional power to veto any line item appropriation); and

6. It is legally impossible for Governor Perry to have committed the offense of "abuse of official capacity" by exercising his constitutional right to veto funds appropriated by the Texas Legislature for the PIU.

B. Count II Should Be Quashed.

Governor Perry is indicted in Count II for "coercion" under Section 36.03 (a)(2) of the Texas Penal Code. Governor Perry asserts that Count II fails to allege an offense, as a matter of law, in that

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[15] The Texas Penal Code does not define "actual care, custody, control, or management." Therefore, rules of grammar and common usage are relied upon to construe these terms. *See* Section 1.05(b) of the Texas Penal Code and Section 311.011(a),(b) of the Texas Government Code. As a matter of law, Governor Perry could not have had "custody" or "possession" (defined as "actual care, custody, control or management") of monies in the State Treasury, or monies that would be subsequently raised in the next biennium and deposited into the State Treasury for disbursement by the Texas Comptroller of Public Accounts during that biennium. The Texas Comptroller of Public Accounts is the custodian of public monies in Texas and this Court can take judicial notice of that fact.

[16] Under Section 6.01(b) of the Texas Penal Code, any such "possession" could not have been voluntary, because according to the indictment, any such possession was by virtue of his status as the Governor. The indictment fails to allege that the possession was voluntary because it fails to allege that the Governor "knowingly obtains or receives" money or that he was aware of his control of the moneys for a sufficient time to permit him to terminate his control. Additionally, because the term "possession" requires "actual care, custody, control, or management," the statute appears to require "actual" possession, as opposed to "constructive" possession.

"it does not appear [] that an offense against the law was committed by the defendant," "contains matter which is a legal defense or bar to the prosecution," and fails to provide him with adequate notice to prepare a defense and plead a judgment herein as bar to further proceedings in that:

> **a.** Count II is vague, uncertain, indefinite and fails to allege the manner and means of the alleged "threat" (i.e., was the alleged "threat" made orally or in writing, face to face, over the telephone, through a third party, etc).[17]
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> **b.** Count II is vague, uncertain, indefinite and fails to allege the language of the alleged threat so as to reflect that it was a "true" threat,[18] which is required by the free speech provisions of the Constitutions of the United States and of the State of Texas.
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> **c.** As a matter of law, the allegation that Governor Perry influenced or attempted to influence Lehmberg, a public servant, "in the specific performance of her official duty, to wit: the duty to continue to carry out her responsibilities as the elected District Attorney for the County of Travis, Texas through the completion of her elected term of office," fails to allege an offense because a resignation by Lehmberg

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[17] *See e.g., Doyle v. State*, 661 S.W.2d 726 (Tex. Crim. App. 1981). In *Doyle*, the defendant was charged with retaliation for threatening to kill a judge or a third party. On appeal, the defendant contended that there was "no evidence of a threat at all" because the statement was "conditional and not delivered directly to Judge Gibbs." *Id.* at 728. The Court recognized Texas's "longstanding rule" that "a threat, though conditional, is unqualified if the accused had no right to require the condition," *Id.* (citing cases), and found the evidence sufficient. However, the Court reversed the conviction because the trial court had denied the defendant's motion to quash for failure to "specify the manner or means whereby the offense was committed," noting that the defendant's alleged threat "could have been conveyed in a number of ways, including: face to face in person, over the phone directly, through a third party, or through the mail." *Id.* at 730.

[18] *See* Governor Perry's pretrial writ at 20 (discussing narrow category of "true threats" exempt from First Amendment protection); *see also State v. Hanson*, 793 S.W.2d 270, 272 (Tex. App.—Waco, no pet.) (citing *Watts v. United States*, 394 U.S. 705 (1969) for proposition that a threat must be a "true" threat to fall outside of First Amendment protection); *Virginia v. Black*, 538 U.S. 343, 359, 360 (2003) (defining true threat as a "statement[] [through which] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals . . .," or a "threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."); *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character, however, simply because it may embarrass others *or coerce them into action*.") (emphasis added).

would not have been a decision by her in her capacity as a public servant,[19] let alone a decision relating to the "specific performance of her official duty." No provision of Texas statutory or case law reflects any such "specific duty," let alone that a resignation would have been a decision by Lehmberg in her official capacity, as opposed to a decision in her personal capacity.[20]

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[19] Section 36.03 is limited to influencing or attempting to influence a public servant in exercising the public servant's "*official* power" or performing the official's "*official* duty." Neither "official power" nor "official duty" is defined, either in the Texas Penal Code or in case law. Common sense and the context make clear that both are limited to actions taken in the public servant's capacity as a public servant. Remaining in office is not an *official* duty or power. At most, staying in office would be a general duty under the oath of office. Otherwise, resigning from office, regardless of the reason, would be a violation of the oath. Yet, we know people legally resign from office all the time for lots of reasons, including the persuasive request of others, including politicians.

Additionally, while Lehmberg exercises discretion in her capacity as a public servant when she makes decisions in the course of representing the State of Texas in the district and appellate courts, her decisions with regard to remaining in office are not decisions she makes as a "public servant." No Texas law provides that a decision to resign from office would be an act of a public servant in an "official capacity."

[20] Lehmberg's duties are essentially defined by Article 2.01 of the Texas Code of Criminal Procedure, which is entitled "Duties of district attorneys." It outlines the duties of Texas' district which does not include any duty to remain in office. *See also Stern v. State ex rel. Ansel*, 869 S.W.2d 614 (Tex.App.—Houston [14th Dist.] 1994, writ denied) (discussing the clearly defined statutory and common law duties of district attorneys). In fact, there is no Texas statute or case that requires any officeholder to remain in office, let alone a *specific duty* against a public official's resignation. As noted in *Wentworth v. Meyer*, 839 S.W.2d 766, 776 (Tex. 1992) (Hecht, J., concurring), "[o]fficerholders are perfectly free to abuse and neglect their offices and leave them whenever they choose as long as they run for any other office in the state, from dog catcher to Governor, except the Legislature." Moreover, if Lehmberg had resigned from office, and if her resignation had been accepted, that would not have divested her of the obligation and authority to perform the duties of her office until her successor qualified. *See Plains Common Consol. Sch. Dist. No. 1 of Yoakum Cnty v. Hayhurst*, 122 S.W.2d 322, 326-327 (Tex. Civ. App. 1938, no writ) (discussing article 16, Section 17 of the Texas Constitution, and specifically stating that "even though [a state officer] resigns and his resignation is accepted, the law operates to continue him in office until his successor qualifies." (explanation added). Thus, a "resignation" cannot be a violation of a specific duty imposed upon Lehmberg or any other "state officer" subject to article 16, Section 17. Otherwise, the Texas Constitution would prohibit a "resignation," making any resignation by a state officer done with the intent to benefit that office a crime under Section 39.02(a)(1) of the Texas Penal Code as "violat[ing] a law relating to the public servant's office or employment."

IV.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Governor Perry respectfully prays that this Honorable Court consider the grounds contained herein and quash and set aside both Count I and Count II of the indictment or, without waiving that relief, direct the amendment of the indictment as to those grounds which legally can be resolved via an amendment of the indictment.

Respectfully submitted,

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V.

CERTIFICATE OF SERVICE

This is to certify that a true and complete copy of this document was emailed to Mr. Michael McCrum at michael@McCrumlaw.com and Mr. David Gonzalez at david@sg-llp.com on the date it was filed.

DAVID L. BOTSFORD

I, VELVA L. PRICE, District Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness my hand and seal of office
On _____

VELVA L. PRICE
DISTRICT CLERK
By Deputy: JH