NO. D1DC14-100139

EX PARTE	§	IN THE DISTRICT COURT
	§	
	§	OF TRAVIS COUNTY
	§	
JAMES RICHARD "RICK" PERRY	§	390TH JUDICIAL DISTRICT

SECOND APPLICATION FOR PRETRIAL WRIT OF HABEAS CORPUS AND/OR SECOND MOTION TO QUASH AND DISMISS THE INDICTMENT

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TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, APPLICANT, JAMES RICHARD "RICK" PERRY, by and through his counsel of record,[1] and pursuant to Texas Code of Criminal Procedure, articles 11.05 *et seq.*, presents this Second Application For Pretrial Writ Of Habeas Corpus And/Or Second Motion To Quash And Dismiss The Indictment, and as grounds therefor, would respectfully show this Honorable Court the following:

I.

NATURE OF RELIEF SOUGHT

Under Texas' criminal justice system, citizens are protected by constitutional guarantees and by the clear wording of statutes. Our laws provide not only substantive protections by clearly defining illegal activity, but also critical procedural protections against governmental overreach. Previously, Governor Perry has explained the serious and incurable substantive defects inherent in the indictment pending against him. In this application, Governor Perry demonstrates the equally serious procedural irregularities underlying that indictment. These basic failures to follow the clear

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[1] For purposes of this application, David L. Botsford is acting as the petitioner. *See* Tex. Code Crim. Proc. art. 11.12, 11.13 and 11.14.

constitutional and statutory process for disqualification of the elected district attorney and appointment of an attorney pro tem require dismissal of the indictment as void ab initio.

Accordingly, this second application for pretrial writ and/or second motion to quash and dismiss[2] attacks the validity of the prosecution and all actions taken by the *purported* attorney pro tem, Michael McCrum, in both Cause No. D1DC13-100112, the grand jury investigation, and Cause No. D1DC14-100139, the indictment. Simply stated, all his actions are *void* due to multiple failures to comply with applicable Texas constitutional and statutory requirements regarding 1) the disqualification of Travis County District Attorney Rosemary Lehmberg, 2) the purported appointment of Mr. McCrum as attorney pro tem, and 3) Mr. McCrum's failure to take, execute, *and* file an oath of office.[3]

These allegations are based upon the contents of the district clerk's files in these two cases. If any additional documents exist, they are not contained in those files. These apparent deficiencies are unfortunate, but counsel have a *duty* to raise them pending filing of any additional documentation

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[2] This document is being filed both as a pretrial writ of habeas corpus and as a motion to quash and dismiss to conserve the Court's resources, and to attempt to expedite any appeal of the issues that may become necessary.

[3] Ordinarily, of course, unless the record reflects that an attorney pro tem was not properly appointed, the law presumes that he was. *Eppes v. State*, 10 Tex 474, 475 (1853), op. on reh'g, 10 Tex. 476 (1853); *Evans v. State*, 769 S.W.2d 319, 322 (Tex. App.—Dallas 1989, no pet.); *Jones v. State*, No. 11-05-00152-CR, 2006 WL 2024359, at *1-2 (Tex. App.—Eastland 2006, no pet.). However, these cases all rely upon the appellate presumption of regularity that arises when a defendant has not designated for inclusion in the appellate record the documents relating to the appointment of an attorney pro tem. Here, Governor Perry is timely raising these issues in the trial court and asserting non-compliance with Article 2.07 of the Code of Criminal Procedure, and Article XVI, Section 1 of the Texas Constitution. In these circumstances, objection in the trial court preserves error. *See Hartsfield v. State*, 200 S.W.3d 813, 816 (Tex. App.—Texarkana 2006, pet. ref'd) (defendant forfeited any error when he did not object to attorney pro tem's authority before appeal); *Stephens v. State*, 978 S.W.2d 728, 730 (Tex. App.—Austin 1998, pet. ref'd) (any error waived by the defendant's failure to object to the authority of the attorney pro tem during trial).

which could potentially resolve the statutory and constitutional problems apparent from the contents of the district clerk's files. Indeed, the American Bar Association states that "[d]efense counsel should consider all procedural steps which in good faith may be taken, including, for example, . . . seeking dismissal of the charges." ABA Standards for Criminal Justice, § 4-3.6 170-71 (3d ed. 1993).

While Texas law permits a private attorney to stand in the shoes of the Travis County District Attorney, it prescribes exact and careful procedures to ensure that the attorney pro tem is required under the law, is duly named, and has properly qualified. Insofar as the records on file in these cases reflect, Mr. McCrum, the purported attorney pro tem, is acting illegally because the basic procedural requirements have apparently been overlooked.

II.

JURISDICTION AND RESTRAINT

This Court has jurisdiction over the subject matter of this writ by virtue of the authority vested in the district courts of the State by Article V, Section 8 of the Texas Constitution and Chapter 11 of the Texas Code of Criminal Procedure. Governor Perry is under restraint by virtue of the indictment returned on August 15, 2014, and by the bond set by this Court. *See* Tex. Code Crim. Proc. art. 11.22. Copies of both are attached as **Exhibit 1**.

III.

CLAIMS FOR RELIEF

Governor Perry asserts that the indictment must be dismissed due to non-compliance with the mandatory provisions of Article 2.07 of the Texas Code of Criminal Procedure, Section 601.008(b)(2) and (c) of the Texas Government Code, and Article XVI, Section 1 of the Texas

Constitution.

A. The Record Fails To Reflect Compliance With Texas Law.

Article 2.07 of the Texas Code of Criminal Procedure establishes the mechanisms for appointing an attorney pro tem. Subsection (a) provides, in relevant part, that "[w]henever an attorney for the state is disqualified to act in any case or proceeding, is absent from the county or district, or is otherwise unable to perform the duties of his office, . . . the judge of the court in which he represents the state may appoint any competent attorney to perform the duties of the office during the absence or disqualification . . . ." The term "attorney for the state" specifically includes, among others, a "district attorney." *See* Article 2.07(d).

Subsection (c) further provides that "[i]f the appointed attorney is not an attorney for the state, he is qualified to perform the duties of the office for the period of absence or disqualification of the attorney for the state *on filing an oath with the clerk of the court*." (emphasis added).

The district clerk's files in Cause No. D1DC13-100112 (the grand jury investigation) and Cause No. D1DC14-100139 (the indictment) do not contain the necessary documents to demonstrate compliance with Section 2.07. Specifically, these files fail to reflect:

> (1) a motion by Rosemary Lehmberg, elected district attorney for the 53rd Judicial District,[4] disqualifying herself from the complaint giving rise to the investigation of Governor Perry;
>
> (2) an order signed by any district judge finding Lehmberg disqualified so as to

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[4] Under Section 43.132 of the Texas Government Code, Lehmberg is the district attorney for the 53rd Judicial District ("the voters of the 53rd Judicial District elect a district attorney," and "[i]n addition to performing the other duties provided by law for district attorneys, the district attorney represents the state in all criminal cases before all the district courts of Travis County.")

lawfully authorize the appointment of an attorney pro tem;[5]

(3) an order signed by Judge Richardson appointing Michael McCrum as a lawful attorney pro tem to handle the investigation and appear before the grand jury; or

(4) an "oath" taken, executed and filed by Mr. McCrum.

The law requires that procedural requisites be observed whenever any Texan, including the Governor, is investigated and charged by the State. The pervasive failure to follow these requisites here requires dismissal.

1. There Is No Documentation Regarding Lehmberg's Request For Disqualification.

A voluntary recusal by Lehmberg, whether to avoid the appearance of impropriety or to protect against a violation of the Texas Disciplinary Rules of Professional Conduct, constitutes a "disqualification" under Section 2.07. *Coleman v. State*, 246 S.W.3d 76, 81 (Tex. Crim. App. 2008); *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 6-7 (Tex. Crim. App. 1990). Article 2.07 requires documentation reflecting the desire or need for an elected district attorney to be "disqualified," so as to authorize an order of "disqualification" and the subsequent appointment of an attorney pro tem. Yet, in this case, the record reflects no motion or request by Lehmberg seeking to be "disqualified."

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[5] The complaint that led to the investigation in this case was filed in the 390th Judicial District Court. The Honorable Julie Kocurek is the elected judge of the 390th Judicial District Court. However, the Honorable Bert Richardson, Senior Judge of the 379th Judicial District Court, has presided over the grand jury investigation since on or about July 15, 2013, when he was appointed by the Honorable Billy Stubblefield, Presiding Judge of the Third Administrative Region. Judge Richardson has also presided over the indictment since it was returned on August 15, 2014.

Section 24.002 of the Government Code provides that "[i]f a district judge determines on the judge's own motion that the judge should not sit in a case pending in the judge's court because the judge is disqualified or otherwise should recuse himself or herself, the judge shall enter a recusal order" and "request the presiding judge of that administrative judicial region to assign another judge to sit. . . ." The district clerk's files in these two cases do not contain an order signed by Judge Kocurek recusing or disqualifying herself.

Such a motion or request is required in this case by Article 2.07, and without its existence, all of Mr. McCrum's actions in this case are without legal effect. Without a valid disqualification, there is no office of attorney pro tem to be filled. "Where no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached." *Jones v. State Bd. of Trustees of Emp. Ret. Sys. of Tex.*, 505 S.W.2d 361, 365-66 (Tex. Civ. App.—Dallas 1974, no writ) (quoting *Norton v. Shelby County*, 118 U.S. 425 (1886)).

2. There Is No Documentation Reflecting A Judge's Acceptance Of Lehmberg's Request.

Article 2.07(b-1) also requires judicial approval of an elected district attorney's request to be "disqualified." *State v. Rosenbaum*, 852 S.W.2d 525, 527 (Tex. Crim. App. 1993). Without such documentation, it cannot be presumed that an elected district attorney is "disqualified," however much he or she may wish to avoid some particular duties of office.

There is no such order in either of the district clerk's files. Without this initial order, no attorney pro tem should have been appointed. Only after judicial approval of the district attorney's "disqualification" can a judge appoint an attorney pro tem under the terms of the statute. Any person appointed attorney pro tem under such circumstances should have declined to accept. Such an order is required in these cases by Article 2.07, and with its existence, all of Mr. McCrum's actions in this case are without legal effect. *See Jones*, 505 S.W.2d at 366.

3. There Is No Documentation Reflecting Mr. McCrum's Appointment As Attorney Pro Tem.

The district clerk's files also fail to reflect that Judge Richardson ever signed or caused to be filed an order appointing Mr. McCrum as attorney pro tem. *See Section A(4), infra* (describing documentation in the district clerk's files, and compare **Exhibit 2** with **Exhibit 3**). Article 2.07

contemplates a written order appointing an attorney pro tem so that the *nature* and *duration* of the appointment are clearly established, both of which are a function of and governed by the reasons proffered by the elected district attorney in his or her request for "disqualification." Texas law does not permit roving, open-ended prosecutorial appointments.

Such a written order is absolutely required.[6] Indeed, the vast majority of cases reflect: (1) a motion filed by the elected district attorney seeking the appointment of an attorney pro tem; (2) an order disqualifying the elected district attorney; and (3) an order appointing an attorney pro tem.[7]

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[6] Only one non-published opinion from an intermediate court has noted that Article 2.07 does not "explicitly" require a "written order of appointment," in a case where the parties had not cited any "caselaw which suggests or requires that the order of appointment . . . be in writing." *Ashlock v. State*, No. 06-10-00205-CR, 2011 WL 1770893, at *4 (Tex. App.—Texarkana May 10, 2011, no pet).

[7] *See e.g.*, *Coleman v. State*, 246 S.W.3d 76, 83 (Tex. Crim. App. 2008) (noting that the "duration of the appointment [of an attorney pro tem] normally depends upon the terms of the appointment order"); *State v. Rosenbaum*, 852 S.W.2d at 526 (motion by elected district attorney to disqualify himself and his staff granted by judge, who appointed an attorney who took and filed an oath of office, along with the order appointing him); *Eggins v. State*, No. 10-12-00206-CR, 2014 WL 2810609, at *1 (Tex. App.—Waco June 19, 2014, pet. ref'd) (reflecting the filing by the elected district attorney of a "Notice of Disqualification," stating that he had a conflict of interest, and seeking the appointment of an attorney pro tem, and district court's written order appointing an attorney pro tem); *State v. Ure*, No. 13-09-00287-CR, 2010 WL 1919500, at *1 (Tex. App.—Corpus Christi May 11, 2010, no pet.) (noting that state appealed from a written order disqualifying "the District Attorney of Victoria County and his assistants from prosecuting the case and appoint[ing] an attorney pro tem"); *In re Guerra*, 235 S.W.3d 392, 400 (Tex. App.—Corpus Christi 2007, no pet.) (at request of grand jury, trial court issued an extensive written order appointing an attorney pro tem to assist the grand jury in its investigation of the elected district attorney), *disapproved of on other grounds by In re Blevins*, No. 12-0636, 2013 WL 5878910, at *3 (Tex. 2013); *Coleman v. State*, 279 S.W.3d 681, 683-84 (Tex. App.—Amarillo 2006), *aff'd* 246 S.W.3d 76 (Tex. Crim. App. 2008) (after the elected district attorney filed a recusal motion, the trial court signed the order granting it, and appointed two individuals as attorneys pro tem); *Mai v. State*, 189 S.W.3d 316, 320 (Tex. App.—Fort Worth 2006, pet. ref'd) (trial court's "conclusory" order was ambiguous because it referred to both appointment of an attorney pro tem and to appointment of a special prosecutor and "record does not reflect the trial court's purpose for appointing [the attorney]"); *State v. Newton*, 158 S.W.3d 582, 587 (Tex. App.—San Antonio 2005, pet. dism'd) (noting that there was no motion for recusal or disqualification, but that the order appointing the attorney pro tem reflected that the

The cases cited above in footnote 7 support the conclusion — consistent with ordinary practice and common sense — that Article 2.07 requires documentation reflecting the desire or need for an elected district attorney to be "disqualified," so as to authorize the appointment of an attorney pro tem. Without such documentation, it cannot be presumed that an elected district attorney is "disqualified" or that any written order appointing an attorney pro tem is valid. Since such an order is required by Article 2.07, without its existence, all of Mr. McCrum's actions in this case are without legal effect.

4. There Is No Documentation Reflecting That Mr. McCrum Has Filed An Oath.

Article 2.07(c) provides that if the "appointed attorney is not an attorney for the state, he is qualified to perform the duties of the office . . . on filing an oath with the clerk of the court." While Article 2.07 does not prescribe the "oath" that must be filed with the clerk of the court, Article XVI, Section 1 of the Texas Constitution sets forth the oath that must be taken by all elected and appointed state officials, even where the applicable statute is silent as to an oath. *See French v. State*, 572 S.W.2d 934, 938 (Tex. Crim. App. 1977) (Opinion on State's Second Motion For Rehearing).

Article XVI, Section 1(a) prescribes the following oath or affirmation that elected and

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appointment was at the request of the elected district attorney "to act in name, place and stead, to do and perform any and all acts by virtue of said appointment. . . ."); *Busby v. State*, Nos. 03-97-00757-CR, 03-97-00758-CR, 1999 WL 230498, at *1 (Tex. App.—Austin April 22, 1999, no pet.) (setting out verbatim the written "order appointing special prosecutor"). *Stephens v. State*, 978 S.W.2d 728, 731 (Tex. App.-Austin 1998, pet. ref'd) (stating that "the motion for the appointment of an attorney pro tem, the order appointing such officer, and the constitutional oath should be carefully worded to distinguish between an `attorney pro tem' and a `special prosecutor'"); *Meador v. State*, 811 S.W.2d 612, 615 (Tex. App.—Tyler 1989), *aff'd*, 812 S.W.2d 330 (Tex. Crim. App. 1991) (stating that the elected district attorney notified the judge by letter that he was disqualified, that the judge subsequently issued a written order finding the district attorney disqualified, and included in that order the appointment of the attorney pro tem).

appointed public officials "shall take" "before they enter upon the duties of their offices." This oath or affirmation states the following:

> I, _____, do solemnly swear (or affirm) that I will faithfully execute the duties of the office of _____ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God.

Article XVI, Section 1(b) then prescribes the "anti-bribery" statement that elected and appointed public officials must take "before taking the Oath or Affirmation of office" prescribed by Section 1(a). *See also* Tex. Att'y Gen. Op. No. JC-0575 (2002). This oath or affirmation states:

> I, _____, do solemnly swear (or affirm) that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money or thing of value, or promised any public office or employment for the giving or withholding of a vote at the election at which I was elected or as a reward to secure my appointment or confirmation, whichever the case may be, so help me God.

Article XVI, Section 1(c) provides that members of the legislature, the Secretary of State, "and all other elected and appointed states officers shall file" the anti-bribery statement "required by Subsection (b) of this section" with the "Secretary of State before taking the "Oath or Affirmation of office prescribed by Subsection (a) of this section."

The documents on file in the district clerk's office relating to the two cause numbers identified above reflect two copies of Mr. McCrum's anti-bribery statement. *See* **Exhibit 2** (consisting of two copies of a document entitled "Statement Of Officer," filed in D1DC13-100112 only).[8] Both of these were signed on August 19, 2013, and filed with the district clerk on August

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[8] This "Statement Of Officer" is designated "Form 2201" and, along with applicable instructions, is available on the Secretary of State's website.

22, 2013, at 12:00 p.m.[9] But the anti-bribery statement, standing alone, is not enough; it is only the second part of the constitutionally-required oath.

The district clerk's files also reflect a document entitled "Oath Of Office, also filed on August 22, 2013, but only in D1DC13-100112."[10] *See* **Exhibit 3**. This is the proper form for complying with the Constitutional oath or affirmation mandated by Article XVI, Section 1(a) of the Texas Constitution. However, this document is legally deficient because it has not been signed by McCrum as the "officer" who is taking, signing and swearing to the oath. Instead, it is signed only by "Judge Bert Richardson, Senior Judge" — on the line provided for the "Signature Of Officer" — and by Maria Salinas, a Notary Public in Bexar County. As such, there is no oath of office taken and signed by Mr. McCrum on file in either of these cases.

Because taking, executing, and filing the oath in these cases is mandated by Article 2.07, failure to make such a filing, even if the oath had been taken and executed, is manifestly a failure to comply with a mandatory statute. Mr. McCrum, accordingly, has not satisfied a condition precedent to his right to act as an attorney pro tem.[11] Absent compliance with Article 2.07, the acts of a purported attorney pro tem are void, just as the acts of a purported judge who takes no oath are

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[9] The first copy bears a fax "header" which indicates that it had been faxed on August 19, 2013 at 14:07 and at 15:12. *See* **Exhibit 2**, page 1. The second copy in **Exhibit 2** does not contain a fax "header".

[10] This "Oath Of Office" is designated "Form 2204" and, along with applicable instructions, is available on the Secretary of State's website.

[11] *See French v. State*, 572 S.W.2d 934, 939 (Tex. Crim. App. 1977) (stating that the right of an appointed, municipal judge "to act in that capacity as a judge . . . depends upon the taking of the oath of office prescribed by the Constitution, constituting a condition precedent to his right to act in that capacity," (citing *Brown v. State*, 238 S.W.2d 787 (Tex. Crim. App. 1950))).

void.[12] Mr. McCrum's failure to take, execute *and* file his oath in both cases renders everything he has done up to this point without authority and void.

Indeed, under the reasoning of *French*, "without the taking of the oath prescribed by the Constitution of this State, one cannot become either a de jure or de facto [attorney pro tem], and his acts as such are void." *French*, 572 S.W.2d at 939 (explanation added); *see also Prieto Bail Bonds v. State*, 994 S.W.2d at 321 (same). Mr. McCrum's failure to take and execute the oath prescribed by Article XVI, Section 1(a) of the Constitution, and to file it as mandated by Article 2.07 of the Code of Criminal Procedure, dictates the conclusion that Mr. McCrum is neither a de jure nor de facto attorney pro tem. *French, supra; Prieto Bail Bonds, supra; Newton*, 158 S.W.3d 582, 588-589 (Tex. App.—San Antonio 2005, pet. dism'd)(noting that the failure of the attorney pro tem to take and file the oath required by Article 2.07 and Article XVI, Section 1(a) of the Texas Constitution rendered his acts void if objected to, but if not objected to, only voidable and subject to forfeiture absent a timely objection).

This conclusion is buttressed by Section 601.008(b)(2) and (c) of the Texas Government Code, which specifically provide that a "person who . . . has not qualified for office" is not "entitled to exercise the powers or jurisdiction of the office," and that any purported "official acts of a person" who fails to qualify as an officer "are void." On the face of the record, Mr. McCrum falls squarely within this prohibition.

The taking, executing *and* filing of both oaths is required by Article XVI, Section 1, Article

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[12] *See Id.* (holding that "without the taking of the oath prescribed by the Constitution of this State, one cannot become either a de jure or de facto judge, and his acts as such are void"); *Prieto Bail Bonds v. State*, 994 S.W.2d 316, 321 (Tex. App.—El Paso 1999, pet. ref'd) (holding that "because [the judge] was required to take the constitutional oaths, but did not do so, all judicial actions taken by him in the case were without authority").

2.07, and Section 601.008(b)(2) and (c). Because Mr. McCrum has not done so, all of his subsequent actions in both of these cause numbers are without legal effect.

B. Because Of These Statutory And Constitutional deficiencies, Mr. McCrum Is Not An Attorney Representing The State And The Indictment Must Be Dismissed.

Article 20.01 *et seq.* of the Texas Code of Criminal Procedure establish the framework for the proper functioning of a grand jury. Under Article 20.03, "[t]he attorney representing the State," which includes the "district attorney," is authorized to "go before the grand jury and inform them of offenses liable to indictment." Article 20.011 governs who is allowed in the grand jury room, and includes "the attorney representing the state." And "[t]he attorney representing the state" . may issue process for witnesses, Article 20.10, and "may examine the witnesses before the grand jury." Article 20.04. However, "[n]o person other than the attorney representing the State or a grand juror may question a witness before the grand jury." Article 20.04. Finally, only "[t]he attorney representing the State shall prepare" indictments and "deliver them to the foreman." Article 20.20.

Absent a valid appointment as an attorney pro tem, Mr. McCrum was not "the attorney representing the State." Thus, he had no authority to appear before either of the two grand juries appointed by Judge Richardson, summon or invite witnesses to appear before the grand jury, question those witnesses, prepare an indictment, or present it to the foreperson. Simply stated, each of Mr. McCrum's acts was conducted without authority and authorization. Because Governor Perry has timely raised these deficiencies, these objections are fully preserved.[13] Because Mr. McCrum

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[13] *See Modica v. State*, 151 S.W.3d 716, 720-21 Tex. App.—Beaumont 2004, pet. ref'd) (requirements of Article 2.07 — in this case, the failure of the "Oath Of Office" portion of the order appointing the attorney pro tem "to have been executed" by the attorney pro tem — can be forfeited if not "insisted upon by objection, request, motion, or some other behavior. . . ."); *Marbut v. State*, 76 S.W.3d 742, 749-50 (Tex. App.—Waco 2002, pet. ref'd) (holding that appointment of attorney pro tem was "fundamentally flawed because the elected district attorney, Dent, was never

was not "the attorney representing the State," he had no authority to do any act before the grand jury or in this case. On this ground alone, the indictment must be dismissed.

C. Alternatively, Non-Compliance With Article 2.07, Section 601.008(b)(2) and (c), and Article XVI, Section 1 Is Harmful And Mandates Dismissal Of The Indictment.

For the reasons set forth above, if Mr. McCrum and others failed to comply with these mandatory requirements, the law requires dismissal of the indictment against Governor Perry. Alternatively, even if error were not conclusively presumed, the error is harmful and mandates dismissal.

The Court of Criminal Appeals has held that "when addressing a grand jury statutory violation, the proper subject of a harm analysis is the product of those proceedings: the charging decision." *Mason v. State*, 322 S.W.3d 251, 257 (Tex. Crim. App. 2010). *Mason* involved the unauthorized presence of police officers in the grand jury room, both of whom were allowed to question eyewitnesses regarding the events in question. In addressing the statutory violations of Article 20.011 and 20.04 of the Code of Criminal Procedure, the Court quoted the following from Supreme Court precedent:

> The prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict. If violations did substantially influence this decision, or if there is grave doubt that the decision to indict was free from such substantial influence, the violations cannot be deemed harmless.

Mason, 322 S.W.3d at 257 (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250 at 263 (1988)). Accordingly, the *Mason* Court held that "[i]f the record does not show that the violation influenced the grand jury, or if [an appellate court] detect[s] just a `slight effect,' then the trial court

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disqualified," that "an attorney pro tem cannot be appointed unless and until the district attorney is disqualified, recused, or otherwise unable to perform," that the appointment of the "attorney pro tem was not authorized," but that the failure to object at trial forfeited the issue on appeal).

was correct to deny [the defendant's] motion to quash." *Id.* at 257 (citing *Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008)). A court should conduct an independent examination of "the record as a whole" to make this determination. *Id.* (citing *Van Nortrick v. State*, 227 S.W.3d 706, 709 (Tex. Crim. App. 2007)).

Because of the central role played by Mr. McCrum in the grand jury process, this Court should find that the violations had a "substantial and injurious effect on the grand jury's decision to indict," *Mason*, 322 S.W.3d at 257, and that there is a "grave doubt that the decision to indict was free from" Mr. McCrum's influence. *Id.*[14] Indeed, the grand jury transcripts should reflect the presence of an unauthorized attorney (Mr. McCrum) before the grand jury at all times. They should also reflect Mr. McCrum's extensive activities, including summoning all witnesses, issuing all subpoenas for documents, conducting virtually all of the "unauthorized" questioning of witnesses,[15] issuing warnings to any witnesses, addressing the grand jury regarding the statutory violations of the Texas Penal Code that said unauthorized attorney believed were committed and what evidence he believed supported those statutory violations, and the preparation of the actual indictment signed by

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[14] Mr. McCrum has not provided a copy of transcripts of the grand jury testimony to counsel and has previously refused counsels' request to have the testimony transcribed, claiming that he was "too busy" to do so. Accordingly, counsel must necessarily engage in some limited speculation.

[15] In *Mason*, the court concluded that there was not a substantial and injurious effect on the grand jury's decision to indict because the "details regarding Appellant's conduct" "were well established by [the prosecutor's *authorized*] questioning, and members of the grand jury could indict Appellant without the additional information solicited by [the unauthorized questioning by the two police officers]." 322 S.W.3d at 257. Furthermore, "[t]he unauthorized questioning served to paint a picture of [the witness'] role, not Appellant's," *id.*, with the court noting that "[i]f we were evaluating [the witness'] testimony as a whole, then we would most certainly detect influence upon the jurors; but, importantly, we are exclusively concerned with the information solicited by the [unauthorized police officers]." *Id.* Since all of McCrum's questioning was "unauthorized," it necessarily follows that there was "influence upon the jurors."

the foreperson. No facet of the grand jury investigation was free from Mr. McCrum's influence.

The actual indictment itself reflects Mr. McCrum's influence in the selection of the charges. For instance, the charge in Count I — misapplying more than $200,000 due to the Governor's veto of an appropriation — is contrary to published cases under Section 39.02(a)(1) of the Penal Code (or its predecessor), as those cases require an actual physical "misuse" of government property by the defendant.[16] Furthermore, as previously explained by Governor Perry, he never had "custody or possession" of any of property, let alone the funds which the Legislature appropriated during the legislative session. As defined by Section 1.07(a)(39) of the Texas Penal Code, "possession" is "actual care, custody, control, or management." At no point during the appropriations process do funds appropriated by the Legislature come into the Governor's care, custody, control, or management. As this Court can judicially notice, no budget even exists until the Governor approves and signs it, and even then it does not become effective until months later (in this case, on September 1, 2013), when funds are eligible for disbursement by the Texas Comptroller of Public Accounts. Moreover, as this Court can also judicially notice, the funds to be disbursed under the two-year budget commencing September 1, 2013, will not have been collected as of August 31, 2013, let alone as of June 14, 2013, the date alleged in Count I of the indictment.[17]

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[16] *See, e.g., Margraves v. State*, 34 S.W.3d 912 (Tex. Crim. App. 2000) (misuse of state university airplane to transport defendant and his wife to son's college graduation); *Talamantez v. State*, 829 S.W.2d 174 (Tex. Crim. App. 1992) (misuse of construction equipment by county commissioner to make improvements to non-county owned real property); *Campbell v. State*, 139 S.W.3d 676 (Tex.App.—Amarillo 2003, pet. ref'd) (misuse of police sergeant by supervisor who had sergeant install computer at the supervisor's residence).

[17] Article III, Section 49a of the Texas Constitution establishes that the Texas Comptroller of Public Accounts is required to provide to the legislature a biennial revenue estimate (BRE) at the beginning of each regular legislative session. Because the legislature is constitutionally prohibited from appropriating more revenue than will be collected, the BRE is used by the legislature to ensure

Count II is even more problematic than Count I and again reflects Mr. McCrum's influence on the grand jury. Not only does a white-horse case hold an identically-worded statute unconstitutionally vague and overbroad, *see State v. Hanson*, 793 S.W.2d 270 (Tex. App.—Waco 1990, no pet.), but the utilization of the word "same" in Count II is nothing more than a thinly disguised effort to attempt to circumvent the statutory exception of Section 36.03(c) that prevents a member of any governing body from a charge of coercion when dealing with another member of any other governing body. Section 36.03(c) does not contain the word "same," but Mr. McCrum has attempted to negate that statutory exception by creating a non-existent exception to the statutory exception, convincing the grand jury to join him in acting as a "superlegislature."

Acting without proper authority, Mr. McCrum unquestionably influenced the entire grand jury proceedings, leading to a procedurally tainted and void indictment. But for Mr. McCrum's unauthorized involvement, 1) witnesses and documents would not have been summoned or subpoenaed for the grand jury, 2) witnesses would not have been questioned before the grand jury, 3) legal advice would not have been provided to the grand jury, and 4) an indictment would not have been prepared and presented to the grand jury. Mr. McCrum's violations had a "substantial and injurious effect on the grand jury's decision to indict," *Mason*, 322 S.W.3d at 257, and there is a "grave doubt that the decision to indict was free from" Mr. McCrum's influence. *Id.* Accordingly, this Court should find harm under the *Mason* standard and grant this motion.

Alternatively, Governor Perry asserts that the pervasive violations of the grand jury statutes

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that appropriations will not exceed the anticipated revenue. Upon final passage of an appropriations bill, it is sent to the Texas Comptroller to certify whether the anticipated revenue will be sufficient to cover the appropriations made by the legislature. *See* Budget 101 A Guide to the Budget Process in Texas at 3, 10 (January 2013), available at www.senate.state.tx.us/SRC/pdf/Budget101 WebsiteSecured_2013.pdf.

in this case are not governed by *Mason*, but are more properly characterized as the denial of absolute, systemic requirements which defy a harm analysis. *See Saldano v. State*, 70 S.W.3d 873, 888 (Tex. Crim. App. 2002); *Marin v. State*, 851 S.W.2d 275, 280 (Tex. Crim. App. 1993). "Absolute, systemic requirements include jurisdiction of the person, jurisdiction of the subject matter, and a penal statute's being in compliance with the Separation of Powers Section of the state constitution." *Saldano*, 70 S.W.3d at 888; *Marin*, 851 S.W.2d at 279. Since a citizen can be charged with a felony offense in Texas only by a grand jury indictment, *see* Article I, Section 10 of the Texas Constitution, the statutory scheme embodied within Article 20.01 *et seq*. of the Texas Code of Criminal Procedure is a legislative implementation of that constitutional guarantee. Thus, a private individual's unauthorized appearance and performance of the duties of the district attorney before a grand jury is such an egregious violation of these systemic requirements as to justify a dismissal, even absent a showing of harm. Accordingly, the Court should also grant this application under this "alternative" proposed standard.

IV.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Governor Perry respectfully prays that his Honorable Court issue a writ of habeas corpus and, after due consideration and a hearing on the claims contained in this application, quash and dismiss the indictment or, in the event that documentation exists elsewhere that could potentially remedy all of these statutory and constitutional deficiencies, that those documents be produced at a hearing to determine the circumstances surrounding their origination and absence from the district clerk's files in these cases.

Respectfully submitted,

THE BUZBEE LAW FIRM
Anthony G. Buzbee
State Bar No. 24001820

BAKER BOTTS L.L.P.
Thomas R. Phillips
State Bar No. 00000102

BOTSFORD & ROARK
DAVID L. BOTSFORD
State Bar No. 02687950

V.

VERIFICATION

My name is David L. Botsford and I am the petitioner in the above and foregoing writ of habeas corpus. Pursuant to Tex. Code. Crim. Proc. art. 11.14(5), I hereby swear that the allegations of the application are true, according to my beliefs.

DAVID L. BOTSFORD

VI.

CERTIFICATE OF SERVICE

This is to certify that a true and complete copy of this document, including all exhibits, has been emailed to Mr. Michael McCrum at michael@McCrumlaw.com on the date it was filed with the Travis County District Clerk.

DAVID L. BOTSFORD

EXHIBIT 1

Indictment & Redacted Personal Bond

No. D1DC14100139

The State of Texas v. James Richard "Rick" Perry

INDICTMENT

Count I - Abuse of Official Capacity 39.02 DPS 23990065
Count II - Coercion of Public Servant 36.03 DPS 13990027

In the 390th Judicial District Court of Travis County, Texas

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY for the County of Travis, State of Texas, duly selected, empanelled, sworn, charged, and organized as such at the January 2014 Term, A.D., of the 390th Judicial District Court for said County, upon its oath presents in and to said Court at said term, that in Travis County, Texas, and anterior to the presentment of this indictment, James Richard "Rick" Perry, committed the following offenses:

Count I

On or about June 14, 2013, in the County of Travis, Texas, James Richard "Rick" Perry, with intent to harm another, to-wit, Rosemary Lehmberg and the Public Integrity Unit of the Travis County District Attorney's Office, intentionally or knowingly misused government property by dealing with such property contrary to an agreement under which defendant held such property or contrary to the oath of office he took as a public servant, such government property being monies having a value of in excess of $200,000 which were approved and authorized by the Legislature of the State of Texas to fund the continued operation of the Public Integrity Unit of the Travis County District Attorney's

Office, and which had come into defendant's custody or possession by virtue of the defendant's office as a public servant, namely, Governor of the State of Texas.

Count II

Beginning on or about June 10, 2013, and continuing through June 14, 2013, in the County of Travis, Texas, by means of coercion, to-wit: threatening to veto legislation that had been approved and authorized by the Legislature of the State of Texas to provide funding for the continued operation of the Public Integrity Unit of the Travis County District Attorney's Office unless Travis County District Attorney Rosemary Lehmberg resigned from her official position as elected District Attorney, James Richard "Rick" Perry, intentionally or knowingly influenced or attempted to influence Rosemary Lehmberg, a public servant, namely, the elected District Attorney for Travis County, Texas, 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, and the defendant and Rosemary Lehmberg were not members of the same governing body of a governmental entity, such offense having been committed by defendant, a public servant, while acting in an official capacity as a public servant.

AGAINST THE PEACE AND DIGNITY OF THE STATE OF TEXAS.

Della M. Tyus
Foreperson of the Grand Jury

35

Master# | MNI# | Booking# | F / M

Name PERRY James Richard "RICK" Date 8/18/14

Last	First	Middle

Address | Cause No. D1DC14 / 100139

City/State Austin Zip 78701 | Charge Abuse of Official Capacity/Coercion

Ph | Phone 2 | Type | Bond 25,000

How L. | County: Travis | i | CZ

Mailing Address | City/State/Zip

Nearest F | Relationship | Phone

Address | City/State/Zip | SS

Employer State of Texas | Position Governor | How Long: 14 years | DL

Address | City/State/Zip | Record No. /

Phone | Cellular | Bkg Date:

Interviewed by | Recommendation | Other Charges

Attorney of Record David Botsford Phone 512-479-8030

TRAVIS COUNTY PRETRIAL SERVICES

P.O. BOX 1748
AUSTIN, TX 78767
(512)854-9381

THE STATE OF TEXAS
COUNTY OF TRAVIS

PERSONAL BOND

KNOWN ALL MEN BY THESE PRESENTS

CAUSE NO. D1DC14 / 100139

THAT I, James Richard "Rick" Perry charged with the offense of a (Misdemeanor) (Felony), to wit, Official misconduct & Coercion

am held and firmly bound unto the State of Texas in the penal sum stated below for the payment of which sum well and truly to be made, and in addition all necessary and reasonable fees and expenses that may be incurred by peace officers in rearresting me in the event the conditions of this bond are violated, I do bind myself, executors and administrators, jointly and severally by these presents.

The condition of the above obligation is that I swear that I will appear before the 390th Judicial Dist Court at the Blackwell - Thurman Criminal Justice Center, 509 W. 11th Street, Austin, Travis County, Texas, on the 29th day of August, 2014, at 9:00A M, or pay to the Court the principal sum of $25,000 BL 22nd plus all necessary and reasonable expenses incurred in any arrest for failure to appear.

I further swear that I will appear before any court or magistrate court before whom this cause may hereinafter be pending at any time and place as may be required.

Now if I shall well and truly make said appearance before the said Court, and there remain from day to day and term to term of said Court, until discharged by due course of law, then and there to answer said accusation against me, and further shall well and truly make my personal appearance in any and all subsequent proceedings that may be had relative to said charge in the course of the criminal action based on said charges, this obligation shall become void; Otherwise to remain in full force and effect.

I further understand that all or part of the information collected in the Pretrial Services Report is available to persons associated with law enforcement, criminal justice, and other agencies including, but not limited to, the Judge or Magistrate hearing the case, the District Attorney's Office, and the defense attorney of record in this case.

Fee=$20/$_____(3% of bond fee if Ignition Interlock Required)

James Perry
Signature of Defendant

SWORN TO AND SUBSCRIBED BEFORE ME,

this_____day of_____,20_____

_____
NOTARY PUBLIC IN AND FOR TRAVIS COUNTY, TEXAS

☐ See attached Conditions Order form

Note: PR granted by agreement between State and Defense.

THIS PERSONAL BOND IS APPROVED, effective only after arresting agency has completed its booking process, and the defendant at such time is ordered released on the conditions of this bond.

I certify that I am the attorney of record representing this defendant in this matter:

David L. Botsford TX 02687950
Signature / Print *SBN*

APPROVED this 18 day of August 2014

Judge Bert Richardson by assignment
Magistrate/Judge

DISTRICT CLERK TRAVIS COUNTY TEXAS

Revised 8/2013 White – Original Yellow – Defendant Copy Pink – Pretrial Services Copy

EXHIBIT 2

Two Copies Of Document Entitled "Statement Of Officer"

DIDC13100112

Form #2201 Rev. 10/2011

Submit to:
SECRETARY OF STATE
Government Filings Section
P O Box 12887
Austin, TX 78711-2887
512-463-6334
512-463-5569 - Fax
Filing Fee: None

STATEMENT OF OFFICER

This space reserved for office use

Filed in the Office of Secretary of State
AUG 19 2013
GOVERNMENT FILINGS SECTION

Statement

I, MICHAEL MCCRUM, do solemnly swear (or affirm) that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money or thing of value, or promised any public office or employment for the giving or withholding of a vote at the election at which I was elected or as a reward to secure my appointment or confirmation, whichever the case may be, so help me God.

Position to Which Elected/Appointed: Attorney Pro Tem

City and/or County: Travis County

Execution

Under penalties of perjury, I declare that I have read the foregoing statement and that the facts stated therein are true.

Date: AUG. 19, 2013

Michael McCrum
Signature of Officer

Revised 10/2011

Form 2201

2

Filed in The District Court
of Travis County, Texas
AUG 22 2013
At 12:00 P. M.
Amalia Rodriguez-Mendoza, Clerk

D1DC13100112

Form #2201 Rev. 10/2011

Submit to:
SECRETARY OF STATE
Government Filings Section
P O Box 12887
Austin, TX 78711-2887
512-463-6334
512-463-5569 - Fax
Filing Fee: None

This space reserved for office use

STATEMENT OF OFFICER

Statement

I, MICHAEL MCCRUM, do solemnly swear (or affirm) that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money or thing of value, or promised any public office or employment for the giving or withholding of a vote at the election at which I was elected or as a reward to secure my appointment or confirmation, whichever the case may be, so help me God.

Position to Which Elected/Appointed: Attorney Pro Tem

City and/or County: Travis County

Execution

Under penalties of perjury, I declare that I have read the foregoing statement and that the facts stated therein are true.

Date: AUG. 19, 2013

Michael McCrum
Signature of Officer

Revised 10/2011

Form 2201 2

Filed in The District Court
of Travis County, Texas
AUG 22 2013
At 12:00 p. M.
Amalia Rodriguez-Mendoza, Clerk

EXHIBIT 3

Document Entitled "Oath Of Office"

D1DC13100112

Form #2204 Rev. 10/2011

Submit to:
SECRETARY OF STATE
Government Filings Section
P O Box 12887
Austin, TX 78711-2887
512-463-6334

Filing Fee: None

This space reserved for office use

OATH OF OFFICE

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS,
I, MICHAEL MCCRUM, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of TRAVIS COUNTY ATTORNEY PRO TEM of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God.

Judge Bert Richardson
Signature of Officer Senior Judge

State of Texas)
County of Bexar)

Sworn to and subscribed before me this 19th day of August, 2013.

(seal)

Maria S Selinas
Signature of Notary Public or Other Officer Administering Oath
Maria S. Selinas
Printed or Typed Name

Filed in The District Court
of Travis County, Texas
AUG 22 2013
At 12:00 p M.
Amalia Rodriguez-Mendoza, Clerk