NO. D1DC14-100139

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

GOVERNOR PERRY'S OBJECTIONS TO THE STATE'S "BILL OF PARTICULARS & AMENDMENT OF INDICTMENT" AND SUPPLEMENTAL MOTION TO QUASH

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 would respectfully show this Honorable Court the following:

I.

Governor Perry's Objections

As to the State's "bill of particulars & amendment of indictment," filed on February 13, 2015, Governor Perry's objections can be summarized as follows:

* The proposed amendment of Count II should be denied and Count II quashed because:

* The current version of Count II admits that Governor Perry was a member of a governing body of a government entity. This affirmatively reflects that Governor Perry is entitled to the benefit of the statutory exception to the coercion statute and that Count II fails to allege a crime.

* The current version of Count II admits that Governor Perry's alleged "threat" was an "official action." This affirmatively reflects that Governor Perry is entitled to the benefit of the statutory exception to the coercion statute and that Count II fails to allege a crime.

* Because the Court has held that Count II does not allege a crime, the attorney pro tem now wants to substitute his own version of the facts and change Count

II to say that Governor Perry was not a member of a governing body and that the alleged "threat" was not an "official action" taken by the Governor in his capacity as a member of a governing body.

* The attorney pro tem should be not be allowed to take inconsistent positions and insert facts not found by a grand jury into an indictment.

* The proposed amendment of Count II will violate Article I, Sections 10 and 12(b) of the Texas Constitution and Article 28.10(c) of the Texas Code of Criminal Procedure.

* If the Court allows amendment of Count II, it should be quashed because:

* The facts that the attorney pro tem now wants to insert into the indictment were not found by the grand jury and will still fail to show that Governor Perry is not entitled to the benefit of the statutory exception to the coercion statute. This means that Count II will continue to fail to allege a crime.

* The attorney pro tem's insertion of facts not found by the grand jury ignores long standing Texas law that the Governor acts in a legislative capacity when he exercises his veto power. This means that Count II will continue to fail to allege a crime.

* The State's effort to amend Count II through a "bill of particulars," allegedly to provide Governor Perry with adequate notice, should not be allowed because:

* Texas law does not authorize a "bill of particulars." Although a "bill of particulars" is used in federal court, the attorney pro tem's "bill" will not bind the State and restrict the State's evidence, as it would in federal court. Governor Perry thus cannot rely on the "bill" to prepare for trial and still does not have adequate notice of the State's allegations.

* The "bill" fails to allege facts, as opposed to conclusions, and therefore provides no notice to Governor Perry.

* If the Court permits the proposed "bill of particulars" to substitute for an amended pleading, the case should still be dismissed for these reasons:

* The State's "bill of particulars" makes it clear that the "misuse" of the veto is the gravamen of Count I, not a misuse of monies.

* Since it is now clear that only the veto was allegedly misused, Governor Perry's separation of powers, Speech or Debate Clause and legislative

immunity arguments are "ripe" for the Court's consideration.

* By conceding that any allegedly misused monies were only "*subject to [Governor Perry'] custody and possession*," the "bill" demonstrates that Count I fails to allege an offense.

* Since a governor's veto power has no monetary value, Count I fails to allege an offense, or at most, alleges a Class C misdemeanor offense.

* If the "bill of particulars" is allowed and the case is not dismissed, the "bill" is still insufficient to provide the notice required by law to the defendant.

* The "bill" admits that Governor Perry never personally threatened Rosemary Lehmberg, but the attorney pro tem has continued to fail to provide notice of the manner and means of the alleged threat in Count II.

* The "bill" fails to provide notice of whether the alleged threat was conditional or unconditional, who allegedly communicated it, to whom it was communicated, and how it was allegedly communicated. Facts reflecting each of these are essential to adequate notice.

* For all of these reasons, the Court should quash both counts, or order such alternative relief as the Court deems proper.

II.

OVERVIEW

Governor Perry is indicted for "abuse of official capacity" in Count I, and for "coercion" in Count II. Last month, in response to Governor Perry's first motion to quash the indictment, the Court ordered the State to amend Count II (coercion) to negate the statutory exception. This statutory exception is not a defense to the crime; rather, negating it is an element of the offense itself. *See* Tex. Penal Code § 2.02(b). The State must both allege it in the indictment and prove it beyond a reasonable doubt before the coercion statute can apply to Governor Perry. The Court also suggested in that order that the State supply Governor Perry with notice of the theory behind Count I (abuse of official capacity). In response to this order, the State has now filed a document entitled Bill of Particulars &

Amendment of Indictment.

The State's filing is woefully deficient. The current language of Count II already pleads the State out of court, which alone warrants denying the State's request for leave to amend and quashing Count II. Yet even the State's newly-proposed language for Count II fails to negate the statutory exception to liability for coercion, again warranting either denial of leave or quashing. Finally, the State attempts to amend Count II in a manner that is foreign to Texas law and should be rejected.

Moreover, the State's purported bill of particulars with regard to both counts is both improper and inadequate. Because such procedural device is not recognized in Texas law, the State's bill probably has no binding effect. It gives the *appearance* of notice to Governor Perry, while leaving the State free to shift strategies at trial if needed. This is not sufficient notice under Texas law to enable Governor Perry to prepare his defense and to plead any judgment as a bar to further proceedings. Moreover, even if the bill were proper, it impermissibly broadens the scope of both counts while still failing to allege facts sufficient to constitute notice to the accused. Because of the State's failure to comply with the Court's order, both counts should be dismissed.

Finally, despite its deficiencies, the bill does confirm what Governor Perry and the Court already suspected (and what the State has heretofore failed to reveal)—Count I of the indictment is based upon the veto and the Governor's motives for that veto. Thus, it is the alleged misuse of the veto—not the misuse of funds that the State now admits the Governor did not actually possess—that constitutes the gravamen of the alleged offense. Misuse of the veto cannot constitutionally be considered a criminal act under the statue. Moreover, even if it could, the veto power is not a "thing of value" to which any particular monetary value could be assigned. Thus, even if Governor Perry's exercise of the veto were somehow a crime, it would at most be a Class C misdemeanor because "the

value of the use of the thing misused is less than $20." Tex. Penal Code § 39.02(c)(1).

III.

The Proposed Amendment of Count II Should Be Denied

A. The State Has Made Judicial Admissions Which Are Fatal to Count II and Which It Cannot Abandon by Amendment

This Court has agreed with Governor Perry that Count II did not negate the exception in Section 36.03(c) by merely alleging that "the defendant and Rosemary Lehmberg were not members of the same governing body of a governmental entity." *See* Order Denying Defendant's First Motion To Quash at 19. That exception provides:

> It is an exception to the application of Subsection (a)(1) of this section that the person who influences or attempts to influence the public servant is a member of the governing body of a governmental entity, *and* that the action that influences or attempts to influence the public servant is an official action taken by the member of the governing body. For the purposes of this subsection, the term "official action" includes deliberations by the governing body of a governmental entity.[1] (emphasis added)

The exception exists because the Texas Legislature did not intend the coercion statute to apply to any "official action" taken by a member of a governing body of a governmental entity to influence or attempt to influence another public servant.

In response to the Court' order, the State now proposes to amend the existing Count II by striking through the following language:

> the defendant and Rosemary Lehmberg were not members of the same governing body

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[1] The term "official action" is not defined by the Texas Penal Code, although Section 36.03(c) makes it clear that "official action" includes "deliberations by the governing body of a governmental entity." Similarly, the term "deliberations" is also not defined in the Texas Penal Code. Terms that are not defined are ordinarily given their plain meaning unless the statute clearly shows that they were used in some other sense. *Mays v. State*, 318 S.W.3d 368, 389 (Tex. Crim. App. 2010).

> of a governmental entity, such offense having been committed by defendant, a public servant, while acting in an official capacity as a public servant

and inserting the following language at the end of Count II:

> and it is further alleged that Rosemary Lehmberg was an elected district attorney in the Judicial Department (or Branch) of Texas, specifically, the District Attorney of Travis County, Texas, and the defendant was the chief officer of the Executive Department (or Branch) of Texas, specifically, the Governor of the State of Texas, and the defendant was therefore not a member of the governing body of a governmental entity in which Rosemary Lehmberg was a member, *and* the defendant's influence and attempt to influence Rosemary Lehmberg by means of an unlawful threat to veto legislative-approved appropriation of funds did not constitute an official action taken by the defendant as a member of a governing body. (emphasis added)

Bill Of Particulars at page 5, 9-10.

As a threshold matter, the State's request to amend Count II should be denied because the State has already pled itself out of court on this count. The proper way to plead a negation of the exception is to allege either: (1) that the defendant was not a member of a governing body of a governmental entity; or (2) that the action which influences or attempts to influence the public servant is not an official action taken by a member of the governing body of a governmental entity. Count II, as it now stands, not only fails to make these showings, but in fact *affirmatively pleads* that it cannot satisfy either of them. The language which the State now seeks to strike —

> 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

— contains two critical facts found by the grand jury that the State cannot now contradict or circumvent.

First, Count II alleges that Governor Perry was a member of a governing body of a governmental entity. This follows from the assertion that "the defendant and Rosemary Lehmberg

were not members of the *same* governing body of a governmental entity." (emphasis added). Use of the word "same" in this phrase reflects a grand jury finding that both Governor Perry and Rosemary Lehmberg were each members of some governing body of some governmental entity, but not the *same* governing body of the *same* governmental entity. Whether this makes sense or not, particularly with regard to Ms. Lehmberg, it was what the grand jury found, and the State cannot improve its case by undoing that finding now.[2]

The second fact found by the grand jury and reflected in the language of Count II which the State now seeks to strike is that Governor Perry's act of influencing or attempting to influence Rosemary Lehmberg was an official action taken by him as a member of a governing body of a governmental entity. This second fact necessarily follows from the indictment's statement that the offense was "committed by defendant, a public servant, while acting in an official capacity as a public servant." Any actions taken while one is acting in an "official capacity as a public servant" logically cannot be "unofficial acts."[3]

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[2] This language is not "surplusage" that the State could otherwise abandon, *see Eastep v. State*, 941 S.W.2d 130, 133-134 (Tex. Crim. App. 1997), overruled in part on other grounds by *Gollihar v. State*, 46 S.W.3d 243, 249-250 (Tex. Crim. App. 2001) and *Riney v.State* 28 S.W.3d 561 (Tex. Crim. App. 2000), but rather language attempting to allege an element of the offense. As such, any amendment by the prosecutor will be "a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment and would deprive [Governor Perry] of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *Russell v. United States*, 369 U.S. 749, 770 (1962). It will create the possibility of a conviction on the basis of facts not found by, and perhaps not even presented to, the grand jury. Simply stated, any amendment to an element of an offense would prejudice Governor Perry's substantial rights and effectively allege a different offense, in violation of Section 28.10(c) of the Code of Criminal Procedure and Article I, Sections 10 and 12(a) of the Texas Constitution.

[3] The term "official acts" contained in the last sentence of Section 36.03(c) is not defined in the Texas Penal Code. Terms that are not defined are ordinarily given their plain meaning unless the statute clearly shows that they were used in some other sense. *Mays*, 318 S.W.3d at 389.

Both of these facts are judicial admissions of the grand jury. *See Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001) ("Assertions of fact, not plead in the alternative, in the live pleadings of a party are regarded as formal judicial admissions." (citing *Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983)). Furthermore, "[a] judicial admission that is clear and unequivocal has conclusive effect and bars the admitting party from later disputing the admitted fact." *Holy Cross*, 44 S.W.3d at 568 (citing *Gevinson v. Manhattan Constr. Co.*, 449 S.W.2d 458, 467 (Tex. 1969)). The State has adopted the findings of the grand jury in presenting the indictment to the Court. Taken together, they bar the State from making any inconsistent allegation under the doctrine of quasi-estoppel and judicial estoppel. *See Schmidt v. State*, 278 S.W.3d 353, 358-359 (Tex. Crim. App. 2009); *Matthews v. State*, 165 S.W.3d 104, 109-111 (Tex. App.—Fort Worth 2005, no pet.); *Clark v. Cotten Schmidt, L.L.P.*, 327 S.W.3d 765, 700 (Tex. App.—Fort Worth 2010, no pet.).[4]

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[4] The doctrines of quasi-estoppel and judicial estoppel both support this conclusion. First, quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken. *Clark*, 327 S.W.3d at 770. Second, judicial estoppel precludes a party who successfully maintains a position in one proceeding from afterwards adopting a clearly inconsistent position in another proceeding to obtain an unfair advantage. *Ferguson*, 295 S.W.3d at 643. While judicial estoppel may appear not to apply, it is Governor Perry's position that the State effectively prevailed in a prior proceeding when it convinced the grand jury to return a true bill. The grand jury proceeding was conducted under a separate cause number and this Court essentially held in its order of November 18, 2014, that Governor Perry should have complained of the deficiencies regarding Mr.McCrum's oath back "at that time" (referring to the documents being on file in August 2013). Furthermore, as the Court is well aware, the State refused to allow Governor Perry to submit to the grand jury three different legal opinions explaining why Governor Perry had not violated any of the four criminal statutes which comprised the basis of the original complaint by Craig McDonald. Those legal opinions, proffered to the Court and to the State, reflect that the exception cannot be satisfied. Finally, it is well settled that a waiver of Fifth Amendment privilege at the grand jury does not waive a person's right to assert the Fifth Amendment privilege at a trial, because the privilege is waived or invoked on a proceeding by proceeding basis. *See United States v. James*, 609 F.2d 36, 44-45 (2nd Cir. 1979); *United States v. Housand*, 550 F.2d 818, 821 n.3 (2nd Cir. 1977); *United States v. Poretto*, 196 F.2d 392 (5th Cir. 1952). This Court should consider the grand jury proceeding to be a prior proceeding for purposes of judicial estoppel.

As *Schmidt* notes, one consideration in deciding whether to apply judicial estoppel "is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." 278 S.W.3d at 358 n.9 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 751(2001)). "The doctrine is not intended to punish inadvertent omissions or inconsistencies but rather to prevent parties from playing fast and loose with the judicial system for their own benefit." *Ferguson v. Bldg. Materials Corp.*, 295 S.W.3d 642, 643 (Tex. 2009). And quasi-estoppel serves to "forbid a party from accepting the benefits of a transaction" and then "taking an inconsistent position to avoid corresponding obligations or effects." *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 240 (Tex. App.—Corpus Christi 1994, writ denied). Here, the State not merely seeks an unfair advantage by substituting its currently-preferred version of the facts for those actually found by the grand jury, but it attempts to vitiate constitutional guarantees of an "indictment" returned by a "grand jury" contained in Article I, Sections 10 and 12(b) of the Texas Constitution.[5]

B. Even if Amended as Proposed, Count II as a Matter of Law Will Not Allege an Offense.

Even if the Court allows the State's proposed amendment, Count II will still fail to negate the exception and therefore fail to allege an offense, as a matter of law. Because the proposed amendment is just as fatally flawed as the initial language, Count II should be dismissed, whether amendment is

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[5] *Tobias v. State*, 884 S.W.2d 571 (Tex.App.—Fort Worth 1994, pet. ref'd), relied upon by this Court in its January 27, 2015 order allowing the State to amend Count II, does not address an amendment to an element of the offense which is inconsistent with and contrary to the facts actually found by the grand jury. If a prosecutor can amend an indictment on the basis of facts that he or she decides to insert into the document, and those facts are inconsistent and contrary to the facts found by the grand jury, then the piece of paper which thereafter purports to be an "indictment" is not lawful under Article I, Sections 10 and 12(b) of the Texas Constitution. Unlike *Tobias*, where the defendant conceded that the indictment could be amended without returning to the grand jury, 884 S.W.2d at 578, Governor Perry makes no such concession and opposes the State's proposed amendment.

permitted or not. *See* Tex. Code Crim. P. art. 27.08 (authorizing exceptions to the substance of an indictment where "it does not appear therefrom that an offense against the law was committed by the defendant").

> The first portion of the proposed amendment to Count II —
>
> and it is further alleged that Rosemary Lehmberg was an elected district attorney in the Judicial Department (or Branch) of Texas, specifically, the District Attorney of Travis County, Texas, and the defendant was the chief officer of the Executive Department (or Branch) of Texas, specifically, the Governor of the State of Texas, and the defendant was therefore not a member of the governing body of a governmental entity in which Rosemary Lehmberg was a member

— is merely a verbose variation of the original charge that "the defendant and Rosemary Lehmberg were not members of the *same* governing body of a governmental entity." But both versions of the allegation are fatally flawed. The statutory exception applies to *any* defendant who is a member of a governing body of a governmental entity. It does not further require that the influenced public servant be a member of a governing body of a governmental entity, much less that the defendant and the influenced public servant be members of the *same* governing body of the *same* governmental entity. The Legislature could have drafted the exception to require as much, but it did not. "Where the statute is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). The prosecution is simply attempting to rewrite—and dramatically narrow—the carefully-selected language of the exception. As noted above, the proper way to negate the first portion of the exception is to allege that the defendant was not a member of a governing body of a governmental entity. The first portion of the proposed amendment to Count II fails to expressly negate the first portion of the statutory exception in Section 36.03(c).

To the extent the proposed amendment could be read to imply that Governor Perry was "not a member of the governing body of a government entity" because he "was the chief officer of the Executive Department (or Branch) of Texas," the proposed language fails to expressly negate the first part of the exception. And even if it did, it runs directly contrary to longstanding Texas law. While most of Governor Perry's duties lie within the purview of the executive branch, in connection with the veto Governor Perry acted in a legislative capacity as a matter of law, and thus as a member of a governing body. *See Jessen Assocs., Inc. v. Bullock,* 531 S.W.2d 593, 598 (Tex. 1976) (Governor's "veto power is a legislative function and not an executive function"); *Fulmore v. Lane,* 140 S.W. 405, 411 (Tex. 1911); *Pickle v. McCall*, 24 S.W. 265, 268 (Tex. 1893).

Thus, for all the alleged conduct that matters in this case, Governor Perry was acting as a member of a governing body of a governmental entity. The Legislature is presumed to have incorporated these established legal concepts into the definition of "governing body" when it enacted Section 36.03(c). *See Kirsch v. State*, 357 S.W.3d 645, 650 (Tex. Crim. App. 2012) ("[T]erms which have a known and established legal meaning, or which have acquired a peculiar and appropriate meaning in the law, as where the words used have a well-known common law meaning, are considered as having been used in their technical sense."); *In re Allen*, 366 S.W.3d 696, 706 (Tex. 2012) ("A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it."). The proposed amendment essentially would ask a jury to make a legal determination overruling established precedent from the State's highest court. This would clearly prejudice Governor Perry's substantial rights in violation of Article 28.10(c) of the Texas Code of Criminal Procedure, not to mention the damage to ordered expectations under the rule of law. Therefore, the first portion of the proposed amendment fails to negate the first portion of the statutory

exception.

For the same reason, the second portion of the proposed amendment to Count II also fails to negate the exception. It alleges that —

> and the defendant's influence and attempt to influence Rosemary Lehmberg by means of an unlawful threat to veto legislative-approved appropriation of funds did not constitute an official action taken by the defendant as a member of a governing body.

Not only is this language inconsistent with the grand jury's determination in the original indictment that Governor Perry "committed" the offense "while acting in his official capacity as a public servant," as argued above, but it is also flatly inconsistent with Texas law that a veto threat is legislative activity. As such, of course, the veto and conduct ancillary thereto falls squarely within "an official action taken by the member of a governing body." Tex. Penal Code § 36.03(c). Moreover, this proposed language attempts to evade the exception with a subtle sleight of hand. While the exception merely requires "an official action taken *by* the member of the governing body," *id.* (emphasis added), the proposed amendment alleges the absence of "an official action taken by the defendant *as* a member of a governing body." (emphasis added). Judicial interpretation must be faithful to the text of the statute. *Boykin*, 818 S.W.2d at 785. Under the plain meaning of the words, the exception applies to any official action taken by a member of a governing body, even if not in the capacity as a member of a governing body. In short, nothing in the proposed language of the amendment to Count II succeeds in negating the second portion of the exception.[6]

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[6] The allegation in the proposed amendment that the threat was "unlawful," despite the fact that the grand jury never made that determination, further illustrates why the proposed amendment should be disallowed as violative of Article I, Sections 10 and 12(b) of the Texas Constitution. The inclusion of the word "unlawful" is nothing but a thinly disguised effort to prejudice Governor Perry's substantial rights by creating the misleading impression that the alleged "threat" was something far more heinous than a staff member's communication of the Governor's intention to veto the funding to some unidentified third party (which is now the State's theory given the

Furthermore, there is additional support for the conclusion that the attempted negation of the exception is contrary to law. Under the Texas Speech or Debate Clause, Article III, Section 21 of the Texas Constitution, absolute immunity and privilege attach to the statements of any official who is acting in a legislative capacity, whether or not the official is a member of the legislature. *In re Perry*, 60 S.W.3d 857 (Tex. 2001). This Speech or Debate privilege, and the common law privilege and immunity that flows from it, would protect discussions between the Governor and his staff regarding a potential gubernatorial veto, a communication with a State Senator representing a constituent who would be affected by a potential gubernatorial veto, a communication with Rosemary Lehmberg regarding a potential gubernatorial veto,[7] and even public dissemination of the Governor's intention to veto.[8] As such, all of these must be considered "official acts taken by the member of a governing body" within the scope of the statutory exception.[9]

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allegation of "party liability" announced by the Bill of Particulars at page 4). It is unknown whether the grand jury found this fact, and so insertion of it to prejudice Governor Perry violates Article I, Sections 10 and 12(b) of the Texas Constitution. Inclusion of the word "unlawful" also appears to be a function of the State's effort to attempt to elevate what is at most a Class A misdemeanor offense to a felony. It also appears to be an attempt to deflect the constitutional deficiencies in Count II which exist due to the failure to allege a "true" threat and the failure of Section 1.07(a)(9)(F) to require an "unlawful" threat, as previously asserted in Governor Perry's prior pleadings.

[7] As discussed below in Section IV of this document, the State's "Bill of Particulars" admits that Governor Perry did not himself communicate with Lehmberg, relying instead on a theory of "party liability." This necessarily follows from the language that "Defendant Perry caused the communication" and that "Defendant Perry is criminally responsible for the communication to Lehmberg." *See* Bill of Particulars at 4.

[8] The Constitution of the United States and the Constitution and laws of this State protect this or any Governor's discretion to veto bills and guarantee his or her absolute right to speak about the public-policy issues involved with his or her decisions.

[9] All of the above actions would be included within the statutory example of "official actions" in that they are a part of the "deliberations" undertaken by Governor Perry as a member of a governing body of a government entity (in connection with the decision whether to exercise his veto power and announce that intended veto). A ruling on Governor Perry's Third Motion To Quash may

The plain meaning of the term "official action" further supports this conclusion. As noted above, the term "official action" is not defined by the Penal Code, although the last sentence of the exception itself includes "deliberations" as one example of conduct that constitutes "official action." Accordingly, the term should be given its plain meaning. *Mays*, 318 S.W.3d at 389. That would logically include all of Governor Perry's actions that relate to his duties as Governor, encompassing not merely the exercise of his veto power, but the discussion, negotiations, and deliberations regarding a potential veto as well.

Additionally, Black's Law Dictionary, Free Online 2nd ed., defines the term "official act" as "an act that is carried out by an officer doing his duties." It also defines the term "official misconduct" as including "unlawful acts committed by a public official while performing his duties."[10] This Court has jurisdiction over Count II, a Class A misdemeanor offense, only because it involves "official misconduct" under Article 4.05 of the Texas Code of Criminal Procedure. This further illustrates that the alleged threat is an "official action" within the statutory exception.

The provisions of Texas' Open Records Act also support the conclusion that Governor Perry's acts are "official acts" within the scope of the statutory exception. The Open Records Act is designed to provide "complete information about the affairs of government and the official acts of public

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well assist the Court in resolving this issue, since the State has not yet seen fit to even attempt to provide notice as to the "manner and means" of the alleged threat, as required by *Doyle v. State*, 661 S.W.2d 726, 770 (Tex. Crim. App. 1981). *See also* Section IV, *infra*.

[10] Blacks Legal Dictionary, 6th ed (1991) defines the terms slightly differently. An "official act" is "[o]ne done by an officer in his official capacity under color and by virtue of his office," and an "[a]uthorized act," and "official misconduct" is defined as "[a]ny unlawful behavior by a public officer in relation to the duties of his office, willful in its character, including any willful or corrupt failure, refusal, or neglect of any officer to perform any duty enjoined on him by law," citing, *inter alia*, *Bolton v. State*, 154 S.W. 1197 (Tex. Crim. App. 1913). The two most recent editions of Blacks Legal Dictionary fail to define either of the terms.

officials and employees." Tex. Gov't Code § 552.001. It defines "public information" as including "information that is written, produced, collected, assembled, or maintained" "in connection with the transaction of official business" "by a governmental body" "for a governmental body" by "an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body." *Id.* § 552.002(a)(1-3). And "[i]formation is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body." *Id.* § 552.002(a)(a-1). Significantly, the act provides that "[a] draft or working paper involved in the preparation of proposed legislation is excepted from the requirements of Section 552.021," and even "[a]n internal bill analysis or working paper prepared by the governor's office for purposes of evaluating proposed legislation is excepted from the requirements of Section 552.021." *Id.* § 552.106. For the State to claim, contrary to the grand jury's original findings and without any actual findings by the grand jury, that Count II does not involve an "official act" is clearly in tension with the Open Records Act.

Moreover, the proposed amendment's inclusion of the word "unlawful" in describing the alleged threat cannot transform Governor Perry's "official action" into an "unofficial action." In *Mays*, the Court addressed an analogous situation in construing the phrase "lawful discharge of an official duty" contained in Section 19.03(a)(1) of the Texas Penal Code. Under the statutory scheme, a murder is elevated to capital murder when the defendant murders a peace officer or fireman "who is acting in the lawful discharge of an official duty." Significantly, the Court stated that "whether [the deceased

police officer] was making a lawful arrest is not relevant to determining if [he] was acting in the lawful discharge of his official duties. A police officer is still acting within the lawful discharge of his official duties when he makes an unlawful arrest, so long as he is acting within his capacity as a peace officer." 318 S.W.3d at 388 (citations omitted). Governor Perry, as a matter of law, acted within his capacity as Governor when he deliberated with his staff regarding the exercise of his veto and any negotiations regarding that potential veto, directly or through his staff. The communication of an intent to veto to the public, let alone to a Senator representing the affected constituent, is also within his capacity as the Governor and hence an "official action."[11]

Finally, if Lehmberg had sued Governor Perry for civil damages arising out of whatever communication she received,[12] he would have been entitled to immunity. For purposes of immunity, an official acts within the scope of his authority if he is discharging the duties generally assigned to

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[11] Other provisions of the Texas Penal Code tend to shed some insight into the situation. For instance, Section 37.10 makes it a crime to tamper with a government record, including knowingly making a false entry in a government record and possessing, selling or offering to sell a governmental record, but provides an affirmative defense to the possession charge if it "occurred in the actual discharge of official duties as a public servant." Section 37.11 makes it a crime to impersonate a public servant "with intent to induce another to . . . rely on his pretended official acts." And Section 38.01 defines the term "governmental function" to include "any activity that a public servant is lawfully authorized to undertaken on behalf of government."

[12] If a public official is actually forced to resign from office under duress, that resignation "may, of course, be withdrawn or avoided." *Crouch v. Civil Serv. Comm'n of Tex. City* 459 S.W.2d 491, 494 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.) (*citing Willborn v. Deans*, 240 S.W.2d 791, 793 (Tex. Civ. App.—Austin 1951, writ ref'd n.r.e.)). However, where a party "threatens" to remove a public official from office by doing what the party has a legal right to do, the public servant's resignation cannot constitute duress. *Willborn*, 240 S.W. 2d at 795 ("[A] threat to do what one has a legal right to do, as bringing suit in court to enforce a claimed civil right, cannot constitute duress."); *see also Dannelly v. Bard*, 62 S.W.2d 301, 308 (Tex. Civ. App.—Beaumont 1933, writ ref'd) (citing additional cases). It necessarily follows that a threat to veto funding, which every Governor has the power to do, could not give rise to a claim of duress and hence would not be actionable.

him.[13] *Lancaster*, 883 S.W.2d at 658.[14]

Accordingly, even if the Court allows the State's proposed amendment, Count II will still not negate either portion of the exception in Section 36.03(c) and thus still fails to allege an offense. The State's request for leave to amend should be denied, but Count II should be dismissed whether it is denied or not because "it does not appear [from the indictment] that an offense against the law was committed by the defendant." Tex. Code Crim. P. art. 27.08.

C. Governor Perry's Objections to the State's Proposed Method of Amending Count II.

The State proposes to effectuate its proposed amendment of Count II by substituting the three pages contained as Attachment A for the actual indictment returned by the grand jury. Not only is this procedure not authorized under the Texas Code of Criminal Procedure, but it violates two provisions of the Texas Constitution: Article I, Section 10 ("no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary"), and Article I, Section 12(b) ("An indictment is a written instrument presented to a court by a grand jury charging a person with the commission of

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[13] A government employee is entitled to official immunity if (1) he is performing a discretionary duty; (2) within the scope of his authority; (3) in good faith. *Univ. of Houston v. Clark*, 38 S.W.3d 578, 580 (Tex. 2000). And actions that involve personal deliberation, decision, and judgment are discretionary, whereas actions that require obedience to orders or the performance of a duty are ministerial. *Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). A decision to veto is obviously discretionary under Article IV, Section 14 of the Texas Constitution.

[14] A similar rule applies to prosecutors, providing them with absolute immunity for their acts even when they act maliciously, so long as their acts are intimately associated with the judicial phase of the criminal process. *Imbler v. Pachtman*, 424 U.S. 409, 427-430 (1976); *Charleston v. Allen*, 420 S.W.3d 134, 137 (Tex. App.—Texarkana 2012, no pet.). Judges are likewise entitled to absolute immunity for their judicial acts, even when the act taken was in error, was done maliciously or corruptly, or was in excess of his or her authority, provided he or she did not act in the clear absence of all jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 356-357 (1978).

an offense.").

Article 28.11 of the Code provides that amendments must be "made with leave of the court and under its direction." And Article 28.10 requires notice and permits defendants to lodge objections. Moreover, Article 28.10(c) precludes the court from permitting amendments that charge an additional or different offense or that will prejudice the substantial rights of the defendant. The State cannot meet this burden.

Actual alteration or interlineation is not the exclusive method by which the State may amend an indictment. *Riney v. State*, 28 S.W.3d, 561, 565-566 (Tex. Crim. App. 2000).[15] However, the State's leeway with the method of an amendment is not unlimited. *Riney* and *Perez* do not authorize the State to substitute language which the grand jury never found (and which it may not have heard any evidence upon) in place of inconsistent and contradictory language which the grand jury did find. *Riney* and *Perez* also do not authorize the State to substitute *elements of the offense* which the grand jury never found (and which it may not have heard any evidence upon) in place of inconsistent and contradictory *elements of the office* which the grand jury did find. The State's proposed amendment here, if allowed, will no longer be "a written instrument presented to a court by a grand jury charging a person with the commission of an offense," as required by Article I, Section 12(b) of the Texas Constitution. It will violate the purpose behind an "indictment," as guaranteed by Article I, Section

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[15] "[I]t is acceptable for the State to proffer, for the trial court's approval, its amended version of a photocopy of the original indictment." *Id.* at 557. "If approved, the amended photocopy of the original indictment need only be incorporated into the record under the direction of the court, pursuant to Article 28.11, with the knowledge and affirmative assent of the defense." *Id.* "This version of the indictment would then become the `official' indictment in the case." *Id. See also Perez v. State*, 429 S.W.3d 639, 643 (Tex. Crim. App. 2014) (upholding the trial court's order granting the State's motion to amend an eleven count indictment by replacing all eleven counts with five counts set out as an exhibit attached to the motion).

10 of the Texas Constitution.[16] Therefore, this Court should deny the State's proposed method of amending Count II.

IV.

The State's "Bill Of Particulars" is not Recognized by Texas Law, Expands the Scope of the Indictment, and Subjects Both Counts to a Further Motion To Quash

A. The State's "Bill Of Particulars" is not Recognized by Texas Law and Provides No Binding Notice.

The requirement of indictment by a grand jury embodied within Article I, Sections 10 and 12(b) of the Texas Constitution protects citizens against arbitrary accusations by the government. *King v. State*, 473 S.W.2d 43, 45 (Tex. Crim. App. 1971); *Riney v. State*, 28 S.W.3d at 565. The face of an indictment must allege every element of the offense and provide notice of the nature and cause of the accusation. *Garcia v. State*, 981 S.W.2d 683, 685 (Tex. Crim. App. 1998). An accused is not required to look elsewhere. *Ward v. State*, 829 S.W.2d 787 (Tex. Crim. App. 1992); *Riney v. State*, 28 S.W.3d at 565 ("The State is bound by the allegations in the charging instrument."); *Crenshaw v. State*, 378 S.W.3d 460, 465 (Tex. Crim. App. 2012) (citing *Leal v. State*, 975 S.W.2d 636, 639 (Tex. App.—San Antonio 1998); *Doyle v. State*, 661 S.W.2d 726, 729 (Tex. Crim. App. 1983).[17]

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[16] The indictment actually returned by the grand jury contains an introductory paragraph stating that the grand jury made findings "upon its oath" that Governor Perry committed the offenses as described in Counts I and II. If Count II is amended, then when the indictment is read to the jury, it will create a misleading impression that the grand jury actually found the facts contained in Count II, when in truth the grand jury made no such finding.

[17] Governor Perry recognizes that in deciding whether a trial court's denial of a motion to quash is harmful, as required by *Adams v. State*, 707 S.W.2d 900 (Tex. Crim. App. 1986), the Court of Criminal Appeals has looked to whether the defendant received sufficient notice from sources other than the face of the indictment. *See Kellar v. State*, 108 S.W.3d 311, 313 (Tex. Crim. App. 2003). The Court of Criminal Appeals has also looked to sources other than the face of the indictment in assessing whether a trial court properly granted a motion to quash. *State v. Moff*, 154

Texas law does not provide for a "bill of particulars." *State v. Houth*, 845 S.W.2d 853, n. 6 (Tex. Crim. App. 1992); *Sledge v. State*, 903 S.W.2d 105, 107 (Tex. App.— Fort Worth 1995), *aff'd*, 953 S.W.2d 253 (Tex. Crim. App. 1997); *Ebert v. State*, 2007 WL 2141557 at *6 (Tex. App.—Austin July 27, 2007, no pet.)(mem. op., not designated for publication).

Under federal procedure,[18] a bill of particulars is specifically authorized, but it *confines* the government's evidence to the particulars furnished and therefore *restricts the government's proof.* *United States v. Haskins*, 345 F.2d 111, 114 (6th Cir. 1965); *United States. Glaze*, 313 F.2d 757, 759 (2nd Cir. 1962); *United States v. Murray*, 297 F.2d 812, 819 (2nd Cir.), *cert. denied*, 369 U.S. 828, 82 S.Ct. 845, 7 L.Ed. 2d 794 (1962); *United States v. Neff*, 212 F.2d 297, 309 (3rd Cir. 1954); *United States v. Land*, 177 F.2d 346, 348-349 (4th Cir. 1949); *United States v. Groves*, 2013 WL 5592911 (W.D. Ky. 2013).

Since a bill of particulars is not recognized in Texas practice, it is unclear whether the State's bill will limit the State's proof and minimize the danger of surprise at trial, or will permit Governor Perry to plead an acquittal or conviction in bar of future prosecution for the same offense.

B. The State's "Summary" Provides no Notice.

Even if the bill is not improper on his face, this bill does not provide Governor Perry with

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S.W.3d 599, 601 (Tex. Crim. App. 2004). "It is up to the trial court to determine whether the notice given to the defendant is sufficient and should quash the indictment is not specific enough." *Id.* at 603

[18] A bill of particulars is authorized by Fed. R. Crim. P. 7(f) and is designed to apprise a defendant of the charges against him with enough detail to allow him to prepare his defense, minimize the danger of surprise at trial, and to allow him to plead an acquittal or conviction in bar of future prosecution for the same offense. *United States v. Garrett*, 984 F.2d 1402, 1415 (5th Cir. 1993); *United States v. Linn*, 889 F.2d 1369, 1373 (5th Cir. 1989), *United States v. Montemayor*, 703 F.2d 109, 117 (5th Cir. 1983), *United States v. Bortnovsky*, 820 F.2d 572, 574 (2nd Cir. 1987), *United States v. Haskins*, 345 F.2d 111, 114 (6th Cir. 1965).

sufficient facts to put Governor Perry on notice of the allegations against him, and it also impermissibly attempts to broaden the charges.

At page 2 of its bill, the State muddies the water. As to Count I, the bill claims that Governor Perry "broke the law in two different ways," by "using a lawful power in an unlawful manner and for unlawful purposes." As to Count II, the bill says that he is indicted "for conveying an illegal threat in a similarly unlawful manner and for unlawful purposes." These statements provide no factual notice and expand the scope of the allegations of both counts. Accordingly, Governor Perry objects to this "summary" to the extent that the State may ever claim that it provides him with any notice.

C. The State's "Bill Of Particulars" as to Count I Provides No Facts, Broadens the Scope of Count I, Exposes Count I to a Further Motion to Quash, and Demonstrates That Governor Perry's Compelling Constitutional Claims are Now Ripe for Adjudication.

The "bill" confirms that the gravamen of Count I is the exercise of Governor Perry's "gubernatorial power to veto." Indeed, the first sentence of the State's "bill" states that "Defendant Perry *misused his gubernatorial power to veto* a legislatively-approved appropriation of funds." This alleged misuse of the veto is reaffirmed in the second and third paragraphs, which each state that Governor Perry allegedly "misused government property that was subject to his custody and possession in that he used the lawful power of gubernatorial veto for an unlawful purpose, to wit: eliminating funding for the Public Integrity Unit after Ms. Lehmberg refused to resign from her elected position as Travis County Attorney."[19]

The "bill" also announces the State's intention to examine Governor Perry's motives for the veto as an integral part of its case. The State does this with a total absence of any binding, specific

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[19] The second use of this language substitutes the word "when" for the word "after." Otherwise, they are identical.

facts that would clarify the nature of the accusation. For instance, the bill leaves totally unspecified the "historical and current management decisions regarding the operation of the Public Integrity Unit" that Governor Perry allegedly "did not approve of." Furthermore, the "bill" is impermissibly vague when it states that Governor Perry threatened to exercise a veto to "coerce Ms. Lehmberg into resigning her elected position and/or stymie or obstruct the continued operation of the Public Integrity Unit under Ms. Lehmberg's management."

The State's "bill of particulars," while not a proper or binding mechanism, and while too vague to be of any benefit, does at least provide the Court with sufficient information to justify the Court's consideration of Governor Perry's constitutional claims regarding separation of powers, the Texas Speech or Debate Clause, and absolute legislative immunity. As previously explained in Governor Perry's application for pretrial writ of habeas corpus, his consolidated reply to the State's response to his writ, and his first motion to quash, neither the Legislature nor the Judiciary has the power to criminalize or prosecute the Governor's exercise of his veto power, absent allegations of bribery. It is now clear that the State cannot make a *prima facie* case as to Count I without introducing evidence of the actual veto and the Governor's motives for his veto. This the State cannot legally do. Governor Perry is protected by absolute legislative immunity for his veto and the Speech or Debate Clause's prohibition of any inquiry into that act and its motives. These constitutional claims are now ripe for this Court's consideration from the face of the indictment and the State's admissions in this bill, without the need for any evidence. The Court should revisit these constitutional claims which were not addressed by the Court in its order denying Governor Perry's first motion to quash.[20]

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[20] The separation of powers, Speech or Debate and legislative immunity claims previously proffered by Governor Perry are not "as applied claims," as set forth in his November 17, 2014, "consolidated reply." Because this topic is extensively addressed in Governor Perry's forthcoming

The second and third paragraphs of the "bill" discuss the alleged "manner and means" of the offense. The "first" "manner and means" is that Governor Perry "was obligated to act in compliance with his express, inherent and implied agreement to faithfully, honestly and impartially execute the duties and authority granted him by virtue of his office as Governor, and to execute such duties for the sole benefit of the people of the State of Texas, and not for the benefit of any private or individual purpose, private business, political party, or other." It obviously fails to provide any facts that could conceivably provide notice of exactly what the State will attempt to prove. It also broadens the scope of Count I by interjecting the Governor's alleged motive for the veto, without any facts. Furthermore, this Court can take judicial notice that no legally-cognizable "agreement" between a governor and the citizenry exists on any point. And significantly, Count I does not allege the violation of any law governing the manner by which state monies must be handled.[21]

The "second" "manner and means" in the "bill" is that, contrary to Governor Perry's oath of office, he "misused government property that *was subject* to his custody and possession in that he used the lawful power of gubernatorial veto for an unlawful purpose, to wit: eliminating funding for the Public Integrity Unit when Rosemary Lehmberg refused to resign from her elected position." (Emphasis added).

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brief to the Third Court of Appeals, a copy of which will be provided to the Court, it is not repeated herein.

[21] The term "misapply" in the abuse of capacity statute also includes dealing with property contrary to "a law, including provisions of the General Appropriations Act specifically relating to government property, that prescribes the manner of custody or disposition of the property." Tex. Penal Code, Section 39.01(2)(C). Of course, any item of appropriation vetoed by Governor Perry never became law. Nevertheless, pending further clarification from the State, Governor Perry may be able to assert an *in pari materia* argument that he should be charged under a more specific portion of the statute. But the State's failure to indict under Section 39.01(2)(C) can nevertheless be viewed as an admission that no such law exists.

The "bill" also confirms that no offense was committed. The first sentence of the bill, coupled with the State's allegations regarding the veto and its motives, constitutes a judicial admission that the gravamen of Count I is not a misuse of money, but rather a misuse of the *veto power*. The State has "valued" the misuse of the veto power by equating it to the amount of funding that would have gone to the PIU but for the veto. Furthermore, to the extent the "bill" could still be interpreted as referring to a misuse of money, the "bill" further admits that any monies were only "subject to his custody and possession" (not that monies had actually come into Governor Perry's custody or actual possession, as required by the statute). This statement affirmatively reflects that Count I fails to allege an offense, because Governor Perry is never alleged to have actually had "custody or possession" of the alleged 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." As a matter of law, at no point during the appropriations process do funds appropriated by the Legislature come into the Governor's care, custody, control, or management. Indeed, as this Court can judicially notice, a budget does not even exist until the Governor approves and signs it. 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. It defies logic and common sense to allege that Governor Perry misused "funds" that he did not have and, indeed, could not have had, which is perhaps why the State now admits that the funds were merely "*subject* to his custody and possession." This admission, however, shows that no offense was committed, as a matter of law, requiring the dismissal of Count II.[22]

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[22] *See Posey*, 545 S.W.2d at 163 (charging instrument must allege facts which if true show a violation of law); *Hobbs v. State*, 548 S.W.2d 884, 886 (Tex. Crim. App. 1977) (facts alleged were insufficient to allege offense); *Ex parte Carter*, 618 S.W.2d 331, 332 (Tex. Crim. App. 1981)

Moreover, even if Governor Perry had somehow exercised "control or possession" over the State's funds, there is no allegation, as in many prosecutions of public officials, that he ever exercised or intended to exercise personal control over such funds, directed them to an illicit purpose, or committed any kind of unlawful act with regard to the funds. Accordingly, the "bill" still provides no factual notice of how the funds were misapplied. Counsel for Governor Perry have been unable to locate any case under the statute or its predecessor which reflects a prosecution of a public official for the misuse or misapplication of an intangible, discretionary *power* that the public official possesses by virtue of his office. Similarly, none of the numerous Texas Ethics opinions addressing the misuse or misapplication of state property address an intangible right of office held by the public official.[23]

The funds which were subject to Governor Perry's veto had not even all been collected as of the date of the veto.[24] Once collected, those funds remained with the Comptroller for disbursement

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(finding that facts alleged in the indictment were insufficient to legally conclude that an offense was committed); *Ex parte Holbrook*, 609 S.W.2d 551, 543-544 (Tex. Crim. App. 1980) (indictment insufficient to allege an offense because it failed to include the facts that must be proved about the drug to make it a controlled substance); *State v. Hoffman*, 999 S.W.2d 573 (Tex. App.—Austin 1996, no pet.) (addressing issue of whether the indictment, quashed by the lower court, violated the statute, and engaging in de novo review of the statute to conclude an offense was alleged); *State v. Watts*, 2007 WL 2324003 (Tex. App.—Beaumont 2007, no pet.) (mem. op., not designated for publication) (holding that if a charge under Section 39.02(a) alleges that the public servant violated a law relating to his employment, but the law allegedly violated cannot meet the definition of "law relating to a public servant's office or employment," then no offense has been alleged under Section 39.02(a) and the indictment should be quashed).

[23] *See, e.g.*, State Ethics Advisory Commission, Advisory Opinions 1984-6, 1984-9, 1984-10, 1984-20, No. 93, No. 134, No. 164, No. 172, No. 182, No. 193, No. 395.

[24] The Court can and should take judicial notice that the majority of funds to be disbursed under the budget that took effect on September 1, 2013, were raised from a multitude of sources after the budget took effect. "Besides taxes, available general revenue funds come from ending balances carried forward from the previous biennium, federal receipts, and non-tax revenue such as interest, investment income, lottery proceeds, and licenses, fees, fines, and penalties." *See* Senate Research Center, *Budget 101, A Guide to the Budget Process in Texas*, at 42 (Jan. 2013). "While there are

at the direction of the Legislature. No misuse of actual funds could have occurred, as a matter of law. Undoubtedly, the State chose to focus on the value of the funds vetoed, as opposed to the veto itself, because the Governor's veto power, as an intangible right, has no monetary value. Had the State alleged a misuse of the veto power and not manufactured an artificial value equal to the amount of funds not disbursed by the Comptroller to the PIU, the State could have alleged only a Class C misdemeanor offense. *See* Tex. Penal Code § 39.02(c)(1) ("An offense under Subsection (a)(2) is (1) a Class C misdemeanor if the value of the use of the thing misused is less than $20."). While this Court would still have jurisdiction over a Class C misdemeanor involving "official misconduct," this Court should declare Count I as a Class C misdemeanor offense, much as it has declared Count II to be a Class A misdemeanor offense. Governor Perry expressly requests that the Court rule on this issue if Count I is not otherwise quashed.

Given the above arguments, Count I, even as supplemented by the "bill," still does not allege, in plain and intelligible language, all the facts and circumstances necessary to establish all the material elements of the offense charged. *Bynum v. State*, 767 S.W.2d 769, 779 (Tex. Crim. App. 1989); *Zweig v. State*, 171 S.W. 747, 753 (Tex. Crim. App. 1914). Furthermore, Count I fails to allege an offense, as a matter of law, because "it does not appear [] 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." Tex. Code Crim. P. art. 27.08. Accordingly, if the Court considers the State's "bill of particulars" for any purpose, Governor Perry moves the Court to quash Count I.

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more than 500 funds and accounts in the state treasury, the General Revenue Fund and a few closely related special funds play key roles in state finance." *Id.*

D. The State's "Bill of Particulars" as to Count II Provides no Facts, Broadens its Scope, and Demonstrates that it Should be Quashed.

The State's bill of particulars as to Count II is also insufficient to provide Governor Perry with the notice to which he is constitutionally entitled. It consists of one paragraph on page 4, providing a judicial admission that Governor Perry did not himself communicate with Lehmberg, relying instead on a theory of "party liability." This necessarily follows from the statements that "Defendant Perry caused the communication" and that evidence will be presented showing that "Defendant Perry is criminally responsible for the communication to Lehmberg."

These statements reinforce the need for a dispositive ruling by the Court on Governor Perry's assertion in his third motion to quash 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). (footnote 17)

See Third Motion To Quash at 7. The manner and means of the alleged "threat" must be supplied in the face of a motion to quash. *See Doyle v. State*, 661 S.W.2d 726, 770 (Tex. Crim. App. 1981). The State's "bill of particulars" does not resolve any of Governor Perry's complaints as to Count II contained in his third motion to quash, including language to reflect whether the alleged "threat" (now unilaterally labeled by the State as "unlawful" for the first time, without a finding from the grand jury) was a "true" threat as required by the free speech provisions of the Constitutions of the United States and the State of Texas. It also fails to reflect whether the alleged threat was conditional or unconditional, who communicated the threat, how it was communicated, and to whom the threat was communicated.

Moreover, the "bill" again interjects into Count II some of the same questionable conclusions

it interjected into Count I (i.e., the "historical and current management decisions"). As argued above, these statements provide absolutely no facts and broaden the scope of Count II.

For all of the foregoing reasons, Count II does not allege, in plain and intelligible language, all the facts and circumstances necessary to establish all the material elements of the offense charged. *Bynum*, 767 S.W.2d at 779; *Zweig*, 171 S.W. at 753. Furthermore, Count II fails to allege an offense, as a matter of law, in that "it does not appear [] that an offense against the law was committed by the defendant," and "contains matter which is a legal defense or bar to the prosecution." Tex. Code Crim. P. art. 27.08. Accordingly, Governor Perry moves to quash Count II, whether in its current or amended form.

E. Count II Alleges Only A Class A Misdemeanor Offense.

The State's assertion that Count II alleges a felony is incorrect for the reasons previously stated by the Court. Indeed, despite the State's assertions at pages 4-5 of the bill that the indictment alleges a threat to commit a felony, the actual allegation — a threat to "take or withhold action as a public servant" — is not a threat to commit a felony.

The State's reference at page 4 of the bill to "Obstruction or Retaliation, a violation of section 36.03" is confusing at best, because Section 36.03 is the coercion statute. If the State intended to claim that the "threat" was a threat of obstruction or retaliation under some other statute, the proper place to make that claim is in the indictment. As it stands, the indictment fails to provide sufficient notice regarding what statute the State alludes to being violated by this new threat. Neither Count II nor the "bill" ever allege any facts which could provide a basis sufficient to provide notice of what offense the State claims the "threat" violated, other than the coercion statute itself. Accordingly, Governor Perry objects to the State's attempted clarification of its position and requests the Court to

dispositively rule on this issue, if in fact Count II is not otherwise quashed.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Governor Perry respectfully prays that this Honorable Court:

(1) deny the State's request for leave to make the proposed amendment and quash Count II of the indictment;

(2) without prejudice to that relief, sustain Governor Perry's objections to the method of the State's proposed amendment and quash Count II; and/or

(3) sustain Governor Perry's objections to the State's "bill of particulars" and thereafter quash Counts I and II; and/or

(4) revisit Governor Perry's constitutional claims regarding separation of powers, Speech or Debate Clause, and absolute legislative immunity and quash Counts I and II; and

(5) Governor Perry also requests any other relief to which he may be entitled or that the Court deems appropriate.

Respectfully submitted,

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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.

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