

Aatsy Daw

AUG 11 2023

CLERK OF THE COURT

**THE SENATE OF THE STATE OF TEXAS
COURT OF IMPEACHMENT**

IN THE MATTER OF
WARREN KENNETH PAXTON, JR.

**ATTORNEY GENERAL WARREN KENNETH PAXTON JR.'S
MOTION TO COMPEL DISCOVERY FROM HOUSE MANAGERS**

The House Managers told this Court that they would disclose all materials subject to the Court's Discovery Order by July 21, 2023. (Exhibit A). Indeed, the House Managers and their counsel declared in public their commitment to transparency and full disclosure of all documents in ways both exhaustive and exhausting.¹

They have utterly failed to follow through on that promise. More importantly, they have violated this Court's Discovery Order. Despite this Court's July 12, 2023 directive requiring that the House produce documents "as soon as practicable," on August 10, 2023, the House Managers produced a highly relevant recording that they have possessed since June 5, 2023. The recording constitutes *Giglio* evidence and is likely exculpatory—meaning the Texas Constitution, the United States Constitution, and the Texas laws that form the foundation of this Court's Discovery Order *required* the audio recording to be disclosed *without* the Attorney General even requesting it. Instead, the House Managers concealed this audio recording from the Attorney General for *over two months* until he sent a letter that unequivocally and specifically requested it.

That is incompatible with both this Court's Order and the Michael Morton Act—as counsel for the House knows, having played a role in the passage of that Act. The Attorney General is entitled to the disclosure of relevant materials whether or not he knows of them. And thank goodness for that: as part of their behind-closed-doors investigation, the House claimed that it conducted at least "15 interviews of people directly involved" and had "many additional conversations." Transcript of Public Hearing at 14:15-23, 15:7-1159:6-8, *In re Paxton* (Transcript). Yet with trial less than a month away, the House Managers have only turned over materials from 6 of the 15 employee interviews and 3 of the "many additional conversations." And they have

¹ See, e.g., <https://www.kxan.com/news/texas-politics/ken-paxtons-defense-and-prosecution-wrestle-over-rules-ahead-of-impeachment-trial/>

offered neither defense nor justification of their actions, instead stonewalling the Attorney General and defying this Court’s Discovery Order at every turn.

The House’s ardent desire to try this impeachment by ambush violates the Texas and U.S. Constitutions, Texas law, and the Court’s Discovery Order. Impeachment is an historic, solemn proceeding that should be reserved for only the most extraordinary of allegations. The House Managers and their counsel degrade these proceedings by relying on underhanded discovery tactics, and their nonchalant approach to both this Court’s Discovery Order and the Attorney General’s constitutional rights is sanctionable and should be immediately addressed by this Court.

ARGUMENT

I. The House Managers Have Flagrantly Violated This Court’s Discovery Order.

On May 24, 2023, the House General Investigating Committee held a so-called “public” hearing where its investigators provided unsworn, hearsay-based testimony as the only publicly revealed support for the Articles of Impeachment that would later be voted out of the House. These clearly inadmissible hearsay statements represented to the people of Texas and the Attorney General that fifteen Office of the Attorney General employees and “many” other individuals were interviewed by the House’s investigative team and provided evidence to support the House’s historic impeachment of a statewide elected official. Transcript at 14:15-23; 15:7-1159:6-8. The House’s jurisdiction over the Articles of Impeachment ended after they were voted out by the House, but that did not stop the House General Investigating Committee from issuing additional subpoenas, two of which were to individuals, presumably to compel them to provide testimony to the House.²

² <https://capitol.texas.gov/tlodocs/88R/minutes/html/C2802023052819001.htm>. One of these individuals was Mindy Montford.

On June 21, 2023, the Senate issued its rules to govern these proceedings, providing that no witnesses could be compelled to sit for a deposition or provide pretrial testimony to either party. S. Journal, 88th Cong., 1st Sess. at 40–52 (2023), Rule 21. But parties were entitled to request that this Court issue subpoenas for documents and trial testimony. *Id.* at Rule 22. A few weeks later, after the House Managers refused to turn over any of the materials supporting their charges and claims to the Attorney General in a clear, deliberate attempt to undermine the rights guaranteed to the Attorney General—and every other Texan—under the Texas and United States Constitutions, this Court issued its July 12, 2023 Discovery Order requiring the House Managers to produce all relevant materials consistent with the Michael Morton Act “as soon as practicable.” The House Managers balked, and this Court had to issue another order on July 20, 2023 reiterating that the House Managers had to turn over all relevant materials—with no exceptions or carve-outs. The House Managers immediately responded and represented to the Court that it would comply with the Discovery Order by July 21, 2023. Ex. A.

That was a lie. The House has made eight “supplemental” productions of materials since July 21, 2023—including materials that they possessed before that date. Indeed, many of these late productions are not just supplemental productions of later-obtained documents; rather, many contain materials that the House clearly had in its possession **prior to July 21, their stated deadline**. Shockingly, the House managers have produced over 90,000 pages of documents *after* the August 5, 2023 pre-trial motions deadline, with no explanation whatsoever as to what they were producing, where the materials came from, or why the House Managers were just now producing the materials. Just this morning, August 11, 2023, a hard drive containing 1.5 terabytes of information was delivered to the Attorney General.

A prime example is an audio recording of Mindy Montford from June 5, 2023, that was produced on August 10, 2023. The Attorney General only learned of Ms. Montford's *compelled* interview on July 25, 2023, when she provided the Attorney General with responses to this Court's subpoena. And his counsel learned the *compelled* interview was in fact recorded just a few days ago. And then it took an August 10, 2023 discovery deficiency letter specifically identifying the missing Mindy Montford interview recording before the House Managers reluctantly produced it. No explanation for why this recording was not provided before July 21, 2023—when the House Managers represented to the Court all materials would be provided to the Attorney General—has been provided.

There is no plausible explanation for this belated production by the House Managers other than either deliberate obfuscation or the willful disregard of this Court's orders. And the extreme remedy of impeachment and potential removal of a statewide elected official—a proceeding aimed at overturning the will of Texas voters—demands the highest level of care in complying with not just this Court's orders, but the Texas and United States Constitutions.

The United States Constitution's Fourteenth Amendment right to due process imposes a duty on prosecutors to disclose exculpatory evidence and potential impeachment evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. U.S.*, 405 U.S. 150, 155 (1972). The constitutional obligation to disclose exculpatory and impeachment evidence exists whether an accused asks for the evidence or not. *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

The Texas Constitution and Texas law provides an accused even greater protections and rights to discovery. The Texas Constitution guarantees notice of the nature and cause of the accusations against an individual, as well as the right to due course of law. Tex. Const. art. I, §§ 10, 19. The Texas Legislature further codified these constitutional rights, including the right to *Brady*

and *Giglio* materials, in the *unanimously* passed Michael Morton Act. 83d Leg., R.S., ch. 49, 2013 Tex. Gen. Laws 106 (amended 2017) (current version at Tex. Code Crim. Proc. art. 39.14). The Michael Morton Act requires in part that the prosecution disclose all materials and tangible things “not otherwise privileged that constitute or contain evidence material to any matter involved in the action that are in the possession, custody, or control of the state or under contract with the state.” *Id.* The Texas Court of Criminal Appeals has clarified that “the word ‘material’ . . . is synonymous with ‘relevant,’” thereby requiring the disclosure of all information and materials *relevant* to “any matter in the action.” *Watkins v. State*, 619 S.W.3d 265, 290 (Tex. Crim. App. 2021); Tex. Code Crim. Proc. art. 39.14(a). Texas Code of Criminal Procedure article 39.14(h) further requires prosecutors to disclose “any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state.” This disclosure obligation is “a free-standing duty” and exists whether or not the information is formally requested from the prosecution. Together, these provisions confer upon prosecutors ongoing duties to disclose any and all evidence relevant to the charges and any evidence “that may be favorable to the defense.” *Watkins*, 619 S.W.3d at 277.

This Court ordered the House Managers to provide discovery consistent with the Michael Morton Act. The House and their counsel have responded by attempting to withhold evidence, namely witness interviews like that of Mindy Montford, that constitute *Giglio* materials, and likely *Brady* materials as well. These interviews lie at the heart of the House’s case, and the still missing interviews provided the public justification for their decision to impeach the Attorney General at all. The House’s continuing failure to comply with these constitutional obligations and this Court’s Discovery Order must be stopped—and the House’s defiant misconduct should be sanctioned.

II. An Additional Order Compelling the House to Comply with this Court's Discovery Order is Necessary.

Instead of treating this trial as the solemn and historic proceeding that it is, the House Managers have resorted to underhanded tactics to avoid disclosing highly relevant exculpatory information by releasing it only if the Attorney General can identify it first. Our Constitution demands better; this Court has ordered better; the public deserves better.

The House Managers have represented to the people of Texas that they interviewed 15 current and former Office of the Attorney General employees (Transcript at 15:7-11), plus many other individuals, before May 24, 2023 (Transcript at 14:15-23). To date, recordings, transcripts, or notes of only 6 of the 15 alleged interviews of current or former employees have been produced, along with materials related to 3 of the other “many” interviews conducted by the House. The Attorney General believes all of these interviews were recorded. Even if they were not, the House’s investigators certainly took notes, including the name and date of each interviewed individual. These materials have also surely been conveyed to the House Managers and their counsel (which now appear to include the state-funded investigators themselves). How else could counsel possibly have believed it appropriate to declare to the public that the evidence is “ten times worse” than previously known to the public?

Labeling the investigators as counsel for purposes of this proceeding is not a basis for withholding their notes under these circumstances because they are not privileged. *In re State of Texas ex rel. Kim Ogg*, 630 S.W.3d 67, 71 (Tex. Crim. App. 2021) (Newell, J., concurring) (citing Tex. Code Crim. Proc. art. 39.14(h)). “[E]xculpatory, impeachment, and mitigating evidence must be disclosed even if it constitutes ‘work product’ This is because the work-product privilege is not absolute, and the duty to reveal exculpatory evidence as dictated by *Brady* overrides any privilege under the work-product doctrine.” *In re State of Texas ex rel. Kim Ogg*, 630 S.W.3d at

71. The requirements of article 39.14(h) require that “work product privilege gives way” to compliance with the “prosecutorial duty to disclose any exculpatory, impeachment or mitigating evidence.” *Id.* at 72 (citing J. Hervey Concurring Opinion at 2; Tex. Code Crim. Proc. art. 39.14(h)). Indeed, “[d]escriptions of potential witnesses and statements that would reveal whether the party had spoken to potential witnesses are not work product and are discoverable.” *Id.* This Court should order the House Managers and their counsel to produce all materials related to all interviews.

The House Managers have also not produced the secretive subpoenas the House issued to various John and Jane Does and entities during the House’s Impeachment Proceedings and investigation. These are clearly relevant materials that fall within the Court’s Discovery Order. This Court should order the House Managers to produce these materials.

And it is apparent that the House’s investigators relied on the House General Investigating Committee’s alleged statutory authority to continue investigating the Attorney General even after the Articles of Impeachment were preferred to the Senate. Mindy Montford’s subpoena and interviews are one such instance, as she was *compelled* to provide documents and be interviewed by the House’s investigators pursuant to a subpoena issued *after* the House preferred the Articles. There are certainly other individuals that were either compelled or intimidated by the House’s investigators to provide documents or testimony after the Articles were preferred and before this Court’s rules governing witness contact were issued. But the only notes, transcripts, or recordings of any witness interviews that occurred after May 24, 2023 that the House Managers have turned over—that, again, constitute impeachment evidence if not exculpatory evidence—is the one they could no longer deny existed: that of Mindy Montford. This Court should order the House

Managers to provide all materials—transcripts, recordings, notes, and correspondence with individuals they contacted or attempted to contact—during this interim period.

III. This Court Should Order That Any Further Productions by The House Managers Require an Explanation.

Again, the House Managers have shockingly produced over 90,000 pages of documents *after* the August 5, 2023 pre-trial motions deadline, with no explanation whatsoever as to what they were producing, where the materials came from, or why the materials were just now being produced. They have also just today, three weeks before trial, produced a hard drive with 1.5 terabytes of data. This Court should put an end to the House’s sloppy-at-best, flippant-at-worst approach to compliance with this Court’s Discovery Order. This Court should order that all documents that fall within the Court’s Discovery Order must be produced by August 15, 2023, without exception. Any document produced after that date should be excluded from trial unless the House Managers can establish both good cause and that the materials were not in their possession prior to August 15, 2023.

IV. The House Managers’ Withholding and Belatedly Producing *Giglio* and *Brady* Materials is Sanctionable.

The Attorney General submits that the recalcitrance and blatant violations of this Court’s Discovery Order by the House and their counsel, as well as their failure to timely comply with their own self-imposed deadline and representations to this Court, is sanctionable. It cannot be adequately addressed with “a bar of soap,” Ex. B, or an apology or explanation. This Court indisputably has the authority to compel discovery and to sanction a party for violating this Court’s Discovery Order. Tex. Govt. Code § 665.027; Senate Rule 6. That authority is broad, permitting the Court to fashion sanctions appropriate to the circumstances of this particular case. The Attorney

General respectfully requests that, in addition to immediately producing the materials described above, a sanction be fashioned to include, at a minimum, the following:

1. That the House Managers produce a log of all disclosed materials consistent with Code of Criminal Procedure art. 39.14(i) and (j) on or before August 15, 2023.
2. That the House Managers provide a privilege log that adequately and precisely describes every item it is withholding on the basis of any privilege by August 15, 2023.
3. That the House Managers be ordered to file a Response indicating *when* the materials they have produced since July 21, 2023, came into their possession, *how* the materials came into their possession, and *why* the materials were not produced earlier.
4. That the House Managers be ordered to file a Response identifying every witness the House Managers, their counsel, the House General Investigating Committee, or any of their agents interviewed, the date of the interview, all individuals present for the interview, whether the interview was recorded (audio or video), whether interview notes were taken (and by whom), and additionally indicating when those videos/notes/transcripts were produced to Paxton by bates number.
5. That the House Managers be ordered to produce all subpoenas the House issued prior to this Court's promulgated rules on June 21, 2023, as well as any attempt by the House to issue a subpoena through the General Investigating Committee's statutory authority since June 21, 2023, without going through this Court, or any attempt to rely upon this authority when contacting individuals or entities related to this proceeding.
6. That the House Managers be ordered to file a Response explaining the delayed production of the Mindy Montford interview, as well as any other materials related to a witness interview that they did not produce before July 21, 2023.
7. If not otherwise ordered, that the House Managers be sanctioned in the form of requiring a written explanation establishing a good-faith basis for any additional supplemental productions, and absent an explanation satisfactory to this Court the House is barred from relying upon any such belatedly produced materials.
8. If not otherwise ordered, that the House Managers be sanctioned in the form of requiring them to specifically identify by bates number all *Brady* and *Giglio* materials.
9. That the House Managers be required to issue a public apology to the Attorney General for their Discovery Order violations.

The Attorney General also respectfully requests that additional sanctions in the form of all or some combination of the following be imposed:

1. That the House be barred from relying upon any materials that it concealed from the Attorney General until after the August 5, 2023 motions deadline, which prevented the Attorney General from the benefit of reviewing or relying upon the same.
2. That the House be barred from relying upon any materials produced after the House's self-imposed July 21, 2023 deadline for compliance with this Court's Discovery Order absent good cause.
3. That the House Managers' counsel be prohibited from making any reference, argument, or eliciting any testimony at trial regarding the breadth or volume of materials it purportedly collected, to include any reference to the evidence being "ten times worse" than publicly known.

CONCLUSION AND RELIEF REQUESTED

The Attorney General respectfully requests that the Court issue yet another Order requiring the House Managers to comply with this Court's prior Discovery Order, to include specifically requiring the House Managers to produce the materials referenced above. The Attorney General also respectfully requests that the Court sanction the House Managers for their discovery order violations as outlined above.

Respectfully submitted.

/s/ Allison M. Collins

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Counsel for the Attorney General

CERTIFICATE OF SERVICE

This motion was served via email on the Senate, the Lieutenant Governor, and the House Board of Managers through their counsel, Rusty Hardin and Dick DeGuerin on August 11, 2023.

/s/ Allison M. Collins

Re: Reiteration of Orders of the Court

From Rusty Hardin <rhardin@rustyhardin.com>

To patsy.spaw@senate.texas.gov<Patsy.Spaw@senate.texas.gov>

CC Dick Deguerin <ddeguerin@aol.com>, Harriet Oneill <honeill@harrietonelllaw.com>, Andrew Murr <Andrew.Murr@house.texas.gov>, lhollingsworth@rustyhardin.com, Stella Jares <Stella.Jares@rustyhardin.com>, tbuzbee@txattorneys.com, Dan Cogdell <dan@cogdell-law.com>, Chris Hilton <christopher.d.hilton@proton.me>, judd.e.stone <judd.e.stone@proton.me>, allison.collins23@proton.me, Amy Hilton <Amy.S.Hilton@proton.me>, kateland.jackson <kateland.jackson@proton.me>, Joseph N. Mazzara <joseph.mazzara86@proton.me>, Chris Sterner <Chris.Sterner@ltgov.texas.gov>, Lola Fender <Lola.Fender@ltgov.texas.gov>

Date Thursday, July 20th, 2023 at 1:25 PM

Thank you very much, Ms. Spaw, we will begin immediately to produce additional discovery in this matter and will complete production of all relevant materials in our possession by the close of business tomorrow, July 21.

Sent from my iPad

On Jul 20, 2023, at 12:56 PM, Patsy Spaw <Patsy.Spaw@senate.texas.gov> wrote:

EXHIBIT A

Re: Deficient Discovery

From Rusty Hardin <rhardin@rustyhardin.com>

To Chris Hilton<christopher.d.hilton@proton.me>

CC Dick Deguerin<ddeguerin@aol.com>, tbuzbee@txattorneys.com, Dan Cogdell<dan@cogdell-law.com>, allison.collins23@proton.me, Amy Hilton<Amy.S.Hilton@proton.me>, kateland.jackson<kateland.jackson@proton.me>, Joseph N. Mazzara<joseph.mazzara@stonehilton.com>, lhollingsworth@rustyhardin.com

Date Thursday, August 10th, 2023 at 10:44 AM

Dear Mr. Hilton,

We will reply to your latest correspondence in due course, but in the meantime you and your co-signee might find it greatly worthwhile to review the Lawyer's Creed. Your continued ad hominem personal attacks on opposing counsel are both extremely unprofessional and demeaning to the profession. In the small town I grew up in, you would have been sent to bed without dinner after having your mouth washed out with soap. You make me long for those days.

Sent from my iPad

On Aug 10, 2023, at 9:46 AM, Chris Hilton <christopher.d.hilton@proton.me> wrote:

Rusty and Dick,

See attached.

Thanks,
Chris

STONE | HILTON

<20230810 Discovery Deficiency Letter.pdf>