



JUL 11 2023

CLERK OF THE COURT

July 11, 2023

Via Email: christopher.d.hilton@proton.me and judd.e.stone@proton.me

Judd E. Stone II, Esq.
Christopher D. Hilton, Esq.
Stone | Hilton PLLC
1115 W. Slaughter Lane
Austin, Texas 78748

Re: Discovery Demand and Motion for Pretrial Scheduling Order or Conference

Dear Messrs. Stone and Hilton:

We write in response to your discovery demand e-mailed to us on July 6, 2023, at 5:54 P.M., and your motion for pre-trial scheduling matters, filed 25-hours later (despite stating in the July 6, 2023 letter that you requested a response within 7 days of the letter). While we will timely respond to your motion as required by the Senate Rules, we address below the issues raised in the letter and further propose an agreement that may moot aspects of the motion.

We disagree with your summary conclusion that select portions of the Texas Code of Criminal Procedure apply to the Senate's impeachment trial. You fail to provide any legal support for your proposition, and you also ignore that Texas Government Code section 665.024 expressly states that "[t]he senate shall adopt rules of procedure when it resolves into a court of impeachment." This is precisely what the Senate did here after careful thought.

Importantly, in detailing the procedural rules that apply both before and during the impeachment trial, the Senate did *not* incorporate the procedures you now claim should apply. Indeed, when the Senate wanted to adopt certain Texas rules, such as the Texas Rules of Evidence, it expressly stated as much.

Similarly, neither the Code nor the Michael Morton Act apply merely because portions of this statutorily created process¹ parallel aspects of criminal prosecutions. To the contrary, the Texas Constitution expressly notes that cases of impeachment "shall only extend to removal from office, and disqualification from holding any" future office in the state. TEX. CONST. Art. XV, § 4. And the Constitution further states that a party "convicted on impeachment shall also be subject to indictment trial and punishment according to law." TEX. CONST. Art. XV, § 4. Thus, the Constitution confirms that a judgment of impeachment is separate and distinct from a criminal prosecution.

¹ Tex. Gov. Code. §§ 665.001–.081.

A trial of impeachment articles in the Senate is not a criminal prosecution, a fact that courts in Texas and elsewhere have routinely recognized. See *e.g.*, *Ferguson v. Maddox*, 263 S.W. 888, 889-90 (Tex. 1924); *Mecham v. Gordon*, 156 Ariz. 297, 303 (Ariz. 1988); *Hastings v. United States Senate*, 716 F. Supp. 38, 41 (D.D.C. 1989), *aff'd mem. on other grounds*, 887 F.2d 332 (D.C. Cir. 1989).

There exist other examples demonstrating how impeachment differs from criminal prosecution. In one proceeding, judgment involves removal from a duly elected office—a privilege—or prohibition of an individual serving in public office. TEX. CONST. Art. XV, § 4. In the other, a criminal prosecution, a judgment may infringe upon an individual's life and liberty. Double jeopardy prohibits prosecution twice for the same crime, but that legal principle does not apply to impeachments. Compare TEX. CONST. Art. 1, § 14 with TEX. CONST. Art. XV. Criminal trials, but not impeachment trials, allow for *voir dire* of jurors, with the State and defendant afforded the right to strike potential jurors. See *e.g.*, TEX. CODE CRIM. PROC. ARTS. 35.01 – 35.29.

Here, the rules the Senate adopted provide Mr. Paxton with ample opportunity to investigate the claims brought against him. Both parties are treated equally and provided the opportunity to compel documents prior to trial and further compel the testimony of witnesses at trial. See Senate Rule 6. Moreover, the Senate Rules expressly recognize that both sides are free to speak with potential witnesses. See Senate Rule 21(g).

Regardless of our disagreement about what the Senate Rules do or should require, and consistent with our continued commitment to transparency, we agree to voluntarily supply you with copies of all relevant documents in our possession, in exchange for Mr. Paxton agreeing to provide us with the same. If agreement is reached, we can commence a rolling production of materials this week.

Please let us know whether Mr. Paxton will accept this agreement by signing below. We can then work with you to establish the details of exchanging documents.

Sincerely,



Rusty Hardin
Rusty Hardin & Associates, LLP
1401 McKinney Street, Suite 2250
Houston, Texas 77010



Dick DeGuerin
DeGuerin and Dickson
1018 Preston, 7th Floor
Houston, Texas 77002

cc: Tony Buzbee
Dan Cogdell
Allison C. Collins
Amy S. Hilton
Kateland R. Jackson
Joseph N. Mazarra

AGREED:

Christopher Hilton on behalf of Warren Kenneth Paxton

Judd Stone on behalf of Warren Kenneth Paxton

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

IN THE MATTER OF WARREN
KENNETH PAXTON, JR.

DEMAND FOR MANDATORY DISCLOSURES

Attorney General Ken Paxton hereby demands that the Texas House of Representatives' Board of Impeachment Managers produce all materials required to be disclosed under the Michael Morton Act, Tex. Code Crim. Proc. art. 39.14. The Texas Constitution and historical precedent treat impeachment as a criminal proceeding, and Texas law is clear: all materials and evidence relevant to any alleged offense must be disclosed by the prosecution without the necessity of a court order. Accordingly, Attorney General Paxton demands per Article 39.14 that the House Board of Managers produce to his attorneys any and all evidence related to the Articles of Impeachment issued by the Texas House of Representatives within seven calendar days. In other contexts, failure to provide disclosures mandatory under Article 39.14 may require retrial of any counts related to the evidence withheld; in this context, it should require dismissal of any related Articles with prejudice, or, at minimum, an order excluding the introduction of any withheld evidence. *See Hallman v. State*, 647 S.W.3d 805, 843 (Tex. App.—Fort Worth 2022, no pet.); *In re State*, 605 S.W.3d 721, 725–26 (Tex. App.—Houston [1st Dist.] 2020, no pet.).

The Texas Constitution and past Senate practice require that the procedural safeguards applicable to a criminal proceeding apply with equal measure to the impeachment of an elected official. For example, Article I, Section 10 of the Texas Constitution guarantees the “Rights of Accused in Criminal Prosecutions” and describes the rights of an impeached official. Under that

section, impeached officials are excepted *only* from “be[ing] held to answer for a criminal offense [only on] an indictment of a grand jury.” Tex. Const. art. I, § 10. All other rights afforded to a criminal defendant are equally afforded to officials in impeachment proceedings. Likewise, both the House and this Court have long recognized that the constitutional safeguards afforded to an accused in a criminal proceeding also apply to the impeachment of an elected official. During the House’s investigation of allegations made against Governor Ferguson, a prosecutor for the House attempted to compel the Governor to testify before the House. *See* H. Journal, 35th Cong., 2nd Sess. 160–61, 777–78 (1917); *see also* State of Tex. Senate Rec. of Proc. of the High Ct. of Impeachment on the Trial of Hon. James E. Ferguson, Governor, S. 35, 2nd and 3rd Sess., at 121 (1917). The judge appointed to rule on the admissibility of evidence and testimony ruled that the Governor could not be compelled to provide testimony and expressly declined to adopt the House prosecutor’s view that the impeachment proceedings were “not necessarily criminal.” H. Journal, 35th Cong., 2nd Sess. at 160–61. The Presiding Officer of the trial of Governor Ferguson likewise recognized, “The weight of authority in the United States and elsewhere . . . is that an impeachment proceeding is a criminal proceeding.” State of Tex. Senate Rec. of Proc. of the High Ct. of Impeachment on the Trial of Hon. James E. Ferguson, Governor, S. 35, 2nd and 3rd Sess., at 337 (1917).

The Texas Supreme Court similarly has held that “impeachment proceedings constitute[] a quasi criminal action” and has analogized the House’s role in an impeachment proceeding to that of a grand jury. *Ferguson v. Maddox*, 263 S.W. 888, 889–890 (Tex. 1924). The House Managers have similarly maintained that the House functioned as a grand jury assessing criminal charges. *See* 88th Leg., R.S., Journal of the Texas House 5922, 5963, 5967. The Texas Senate has tasked the House Board of Managers and its attorneys with prosecuting the Articles at trial. *E.g.*, Tex. S.

Res. 36, 88th Leg., 1st C.S. (2023), Rules 3, 5(c). The Texas Senate has also issued rules requiring the Attorney General to “answer the said charges of impeachment” and “plead guilty or not guilty to the articles of impeachment preferred against him.” *Id.* Rule 5(a); Tex. S. Res. 36, 88th Leg., 1st C.S. (2023). It further contemplates “final judgment of either acquittal or conviction.” Tex. S. Res. 36, 88th Leg., 1st C.S. (2023), Rule 30(b). Both the requirement that the Attorney General enter a plea and the commencement of a trial that contemplates “conviction” reiterate the criminal nature of the proceeding. Accordingly, there can be no question that an impeachment is a criminal proceeding—and that the House Board of Managers must comply with the Texas Code of Criminal Procedure to ensure a fair and impartial trial. *See also* Tex. Code Crim. Proc. art. 1.02.

Texas law requires prosecutors to disclose all materials and tangible things “not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or under contract with the state.” Tex. Code Crim. Proc. art. 39.14(a). The Texas Court of Criminal Appeals has held that “the word ‘material’ . . . is synonymous with ‘relevant.’” *Watkins v. State*, 619 S.W.3d 265, 290 (Tex. Crim. App. 2021). Further, Texas Code of Criminal Procedure article 39.14(h) 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 is unlimited in scope; prosecutors have an ongoing duty to disclose any and all evidence that “*may* be favorable to the defense even if that evidence is not ‘material.’” *Watkins v. State*, 619 S.W.3d 265, 277 (Tex. Crim. App. 2021) (emphasis added). The House must therefore produce all information in its possession, custody, or control—or in the possession, custody, or control of any of its committees, attorneys, investigators, employees, contractors, and the House Board of Managers—that is relevant in any way to the Articles of Impeachment. *See also In re State*, 659

S.W.3d 1, 12 n.7 (Tex. App.—El Paso, 2020, no pet.) (holding that the Michael Morton Act requires disclosure of all evidence that is in the “possession, custody, or control of . . . any person under contract with the state”).

The House’s obligation to disclose and produce this information exists independent of a court order, and the House’s duty to disclose all evidence described within article 39.14(h) exists independent of a formal request by the Attorney General. *See Watkins*, 619 S.W. 3d at 277–78; *see also* Tex. Code Crim. Proc. art. 39.14(h). Nevertheless, the Attorney General makes this formal demand for these disclosures because the House Board of Managers has so far failed to provide the Attorney General with any of the documents or testimony allegedly collected during the House’s secretive impeachment proceedings.

In Texas, “disclosure [is] the rule and non-disclosure the exception.” *Watkins*, 619 S.W.3d at 277. The House Board of Managers is obligated to produce all information related to the Articles of Impeachment. Accordingly, the House Board of Managers’ production should include at minimum the following information:

1. All reports and records, including law enforcement reports and records of witness interviews, witness statements, photographs, audio and video recordings, and any other letters, accounts, papers, or information that constitutes or contains evidence relevant to any matter related to the Articles of Impeachment or the Impeachment Proceedings, as defined in Texas Government Code § 665.001, *et seq.*
2. Copies of any expert reports and any business, medical, or governmental records in the possession, custody, or control of the House Board of Managers related in any way to the Articles of Impeachment or the Impeachment Proceedings.
3. All written or recorded statements made by or attributed to the Attorney General.
4. All subpoenas, warrants, or other official process, directed to the Attorney General, his subordinates, or the Office of the Attorney General related to the Articles of Impeachment or the Impeachment Proceedings.
5. Copies of all public records, including all records in the possession, custody, or control of the House Board of Managers, their staff, their investigators, and all individuals who

testified before the House Committee on General Investigating, related to the Articles of Impeachment or the Impeachment Proceedings, including electronic, written, or other communications related to such records.

6. All exculpatory, impeachment, or mitigating documents, items, or information that would tend to negate any element of any Article of Impeachment, or that would tend to reduce the punishment for any Article.
7. Details regarding the existence of any payment or reimbursement or any promise of immunity, leniency, or preferential treatment, or of any offer to provide any of the foregoing made to any witness or prospective witness, to include the General Investigating Committee's investigators who appeared as fact witnesses immediately prior to the House's adoption of the Articles of Impeachment.
8. All materials produced by any person or entity in response to any subpoena issued by the General Investigating Committee in connection with or related to the Articles of Impeachment or the Impeachment Proceedings.
9. All additional materials to which a defendant would be entitled under Article 39.14 of the Texas Code of Criminal Procedure.

In accordance with Texas law, the Attorney General requests that the Texas House of Representatives provide an itemized list of every "document, item, or other information provided to [him] under [article 39.14]." Tex. Code Crim. Pro. art. 39.14(i).

Since the passage of the Michael Morton Act, a defendant need not establish good cause for production of these materials. *See In re State*, 659 S.W.3d at 12 (recognizing that the Michael Morton Act "delete[d] the good cause requirement"). Nevertheless, timely production of these materials is necessary to secure Attorney General Paxton's constitutional rights to due process and the due course of law, to present a complete defense, and to confront and cross-examine witnesses, as those rights are guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 19 of the Texas Constitution. Should the House fail to comply with its statutory obligations, the Attorney General will move to compel production of these disclosures and move to exclude any evidence that is not timely disclosed or to dismiss any charge to which the withheld evidence may be relevant. *See In re State*, 605 S.W.3d at 726 (Tex.

App.—Houston [1st Dist.] 2020, no pet.) (“It is well-settled that when evidence is not produced in contravention of the requirements of article 39.14, exclusion of evidence . . . is in the nature of a court-fashioned sanction for prosecutorial misconduct. . . .” (internal quotations omitted) (citing *Francis v. State*, 428 S.W.3d 850, 855 (Tex. Crim. App. 2014)); *see also* Tex. Code Crim. Proc. art. 28.01, § 1(6).

Respectfully submitted.

/s/ Christopher D. Hilton

Judd E. Stone II
Christopher D. Hilton
Allison C. Collins
Amy S. Hilton
Kateland R. Jackson
Joseph N. Mazarra

STONE|HILTON PLLC
1115 W. Slaughter Ln.
Austin, TX 78748
(737) 465-3897
judd.e.stone@proton.me
christopher.d.hilton@proton.me
allison.collins23@proton.me
amy.s.hilton@proton.me
kateland.jackson@proton.me
joseph.mazzara86@proton.me

Counsel for the Attorney General

CERTIFICATE OF SERVICE

This demand was served via email on the House Board of Managers through their counsel, Rusty Hardin and Dick DeGuerin, on July 6, 2023.

/s/ Christopher D. Hilton

Christopher D. Hilton