NO. D-1-DC-14-100139

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

**ORDER RELATING TO AUTHORITY OF ATTORNEY PRO TEM**

On November 6, 2014, the parties appeared before this court[1] for a pre-trial hearing on Defendant's Second Writ/Second Motion To Quash, which involves the issue of whether the indictment against the Defendant should be dismissed based upon the alleged lack of authority of the Attorney Pro Tem to act.

Regardless of the label placed upon this particular claim for dismissal (whether it is called a "writ" or a "motion to dismiss" or a "motion to quash," or an "objection"), for the reasons discussed herein, this court OVERRULES Defendant's objection to the authority of the Attorney Pro Tem to act in this case and DENIES Defendant's claim for relief.[2]

The court holds, therefore, that the actions taken by Michael McCrum as Attorney Pro Tem are valid and that Mr. McCrum has the authority to act in his capacity as Attorney Pro Tem

---

[1] The undersigned was assigned as a visiting judge to preside over this matter in July of 2013. In light of the undersigned's involvement in many of the factual issues raised by Defendant's motion, prior to conducting the hearing on November 6, 2014, both parties were asked if they wanted another judge to be assigned to preside over the November 6th hearing. Both parties confirmed on numerous occasions, both on and off the record, that they did not want another judge to preside over this hearing. There was no motion to recuse made by either party, despite the offer by the undersigned to voluntarily recuse himself. (R.R. from 11/6/14 pretrial hearing, page 7).

[2] The State initially argues that Defendant has not used the proper procedural mechanism to challenge Mr. McCrum's authority to act as Attorney Pro Tem in this case and also that the Defendant does not have the proper standing to challenge Mr. McCrum's authority. The State's points are well taken, and the cases the State cites are persuasive, particularly since the Defendant is seeking extraordinary relief in the form of a dismissal of the indictment. (R.R. p. 26). However, this court chooses to address the substance of Defendant's claim for relief for the purposes of this Order, and thus it will treat Defendant's challenge as an objection to the authority of Mr. McCrum in his capacity to act as Attorney Pro Tem. The trial court is not, however, attempting to create a right of appeal where one does not exist, or attempting to thwart a right of appeal should one exist. *See, e.g., Markel v. World Flight, Inc.*, 938 S.W.2d 74, 78 (Tex.App.-San Antonio 1996, no writ)("It is the substance of the order which determines whether it is appealable," not the label placed on it.)

in this case. This ruling does not address the merits of the other three pre-trial motions pending before the court, but addresses only the Defendant's claims related to the authority of Mr. McCrum to act as Attorney Pro Tem and the validity of his actions taken from the inception of this case.

Specifically, Defendant claims that Mr. McCrum, acting in the place of the Travis County District Attorney, was not authorized to proceed in that capacity given the lack of a written order appointing him, the lack of Mr. McCrum's signature on the Oath of Office, and the administration and filing of the Oath of Office of the Attorney Pro Tem and the Statement of Officer (aka the "anti-bribery statement"). Defendant also complains that he did not have access to certain documents that should have been available in the public record.

A chronology of the case up to this point and an explanation of how the documents came to be filed are set forth below. Thereafter, the court addresses the substantive legal issues raised.

## CHRONOLOGY OF EVENTS

| | |
|---|---|
| June 14, 2013 | Letter to Rosemary Lehmberg and David Escamilla from Craig McDonald requesting an investigation into suspected criminal conduct based upon actions of Governor Rick Perry. (State's Exhibit 2) (Filed with Court on June 24, 2013, see State's Exhibit 8, which is a list of documents filed with the District Clerk). |
| June 24, 2013 | Letter from Rosemary Lehmberg to Judge Julie Kocurek referring to Judge Kocurek the criminal complaint against Governor Rick Perry. In this letter, Ms. Lehmberg states that "it would be inappropriate for [her] office to investigate this matter." (State's Exhibit 2) (Filed with Court on June 24, 2013, see State's Exhibit 8). |
| June 27, 2013 | District Attorney Rosemary Lehmberg's "Request to be Recused" from the matter of In Re Sworn Complaint Against James Richard "Rick" Perry. (State's Exhibit 3) (Filed with Court on June 27, 2013, see State's Exhibit 8). |
| June 28, 2013 | Order Recusing Rosemary Lehmberg signed by Julie Kocurek. (State's Exhibit 11) (Filed with Court on June 28, 2013, see State's Exhibit 8). |

| | |
|---|---|
| June 28, 2013 | Order of Voluntary Recusal signed by Judge Julie Kocurek submitting the matter to Judge Billy Ray Stubblefield, Presiding Judge of the 3rd Judicial Region of Texas, and requesting that another judge be assigned to preside in this case. (State's Exhibit 4) (Filed with Court on June 28, 2013, see State's Exhibit 8). |
| July 15, 2013 | Order of Assignment by The Presiding Judge, Billy Ray Stubblefield, assigning the Honorable Robert C. ["Bert"] Richardson to preside over this case. (State's Exhibit 5) (Filed with Court on August 22, 2013, see State's Exhibit 8). |
| August 19, 2013 | Oath of Office administered to Michael McCrum by Judge Bert Richardson, signed by Judge Richardson, and notarized by Maria Salinas. (State's Exhibit 6). |
| August 19, 2013 | Statement of Officer (Form 2201) signed by Michael McCrum (the Anti-bribery statement). (State's Exhibit 6). |
| August 19, 2013 | Statement of Officer (Anti-bribery statement) filed in the Office of Secretary of State. (State's Exhibit 6). |
| August 22, 2013 | Statement of Officer (Anti-bribery statement) filed with the District Clerk of Travis County. (See State's Exhibit 8). |
| August 22, 2013 | Oath of Office of Michael McCrum filed with the District Clerk of Travis County. (See State's Exhibit 8). |
| September 13, 2013 | Order Impaneling the first Grand Jury for the October 2013 term (See State's Exhibit 8). (*This was extended on December 31, 2013)* |
| June 27, 2014 | Order Extending the second Grand Jury originally picked for the April 2014 term (See State's Exhibit 8). |
| August 15, 2014 | Indictment signed by the Foreperson of the Grand Jury and filed with the District Clerk of Travis County – State of Texas v. James Richard "Rick" Perry, No. D1DC14100139. (State's Exhibit 7)(See State's Exhibit 9). |
| August 19, 2014 | Waiver of Arraignment filed (See State's Exhibit 9). |
| August 20, 2014 | Personal Bond (See State's Exhibit 9). |
| August 25, 2014 | Application for Pre-trial Writ of Habeas Corpus filed (See State's Exhibit 9). |
| September 5, 2014 | Notice of Appearance of Counsel filed (See State's Exhibit 9). |

| | |
|---|---|
| September 8, 2014 | Notice of Appearance of Counsel filed (Anthony G. Buzbee and Peter K. Taaffe (See State's Exhibit 9). |
| September 8, 2014 | First Motion to Quash and Dismiss The Indictment filed (See State's Exhibit 9). |
| September 30, 2014 | Co-counsel to Attorney Pro Tem filed Oath of Office (See State's Exhibit 9). |
| October 3, 2014 | Second Application for Pre-trial Writ of Habeas Corpus and/or Second Motion To Quash and Dismiss the Indictment filed (See State's Exhibit 9). |
| October 10, 2014 | Opposed Motion For Immediate Transcription of Grand Jury Testimony filed (See State's Exhibit 9). |
| October 13, 2014 | Pre-trial setting (See State's Exhibit 9). |
| October 22, 2014 | Motion For Disclosure of Grand Jury Testimony And/Or For In Camera Inspection of Grand Jury Testimony And Exhibits And Production of Materials Relating To Governor Perry's Application For Writ of Habeas Corpus and For all Exculpatory And Impeaching Materials filed (See State's Exhibit 9). |
| November 4, 2014 | Affidavit of Maria Salinas affirming that she was present when Mr. McCrum repeated the Oath of Office, she notarized the Oath of Office, and she was present when Mr. McCrum repeated and signed the "Statement of Officer" (the anti-bribery statement). (State's Exhibit 1). |
| November 6, 2014 | Pre-trial Hearing addressing arguments pertaining to authority of Attorney Pro Tem. |

## FINDINGS AND CONCLUSIONS

Before addressing the legal issues raised by Defendant's motion, the court finds it necessary to address Defendant's complaints regarding the availability of certain documents related to this case. After the complaints against Rosemary Lehmberg and Governor Perry were made, the first Grand Jury was selected to consider those complaints. However, it is the court's understanding that Mr. McCrum did not use the first Grand Jury for any matters related to his investigation. The second Grand Jury was picked for the April 2014 term, and that Grand Jury

was extended on June 27, 2014. The indictment against Governor Perry was returned by the second Grand Jury on August 15, 2014.

Up until the time of the indictment, the District Clerk's Office had one red rope file folder which contained all of the paperwork relevant to both grand jury proceedings ("Panel 1" and "Panel 2"). Although private information of the grand jurors is not available to the public, the other information in that file could have been accessed by the public upon request. Two files were both given the cause number D1DC13100112. They were created pre-indictment. The first file, containing the grand jury information noted above, was created by the District Clerk of the 390th District Court on August 22, 2013, and was given that file number at the suggestion of Judge Kocurek (with the undersigned present) to assist in the organization of the grand jury information and other filings. The documents placed in that file as they were generated were the original complaints, the assignment of the undersigned visiting judge, the Oath of Office of the Attorney Pro Tem, The Statement of Officer (anti-bribery statement), and copies of these oaths reflecting when the Statement of Officer was filed with the Secretary of State and when both oaths were filed with the Travis County District Clerk's office. The District Clerk's Office's internal computer system also reflects that the Oath of Office and the anti-bribery statement were placed in that file on August 22, 2013. The "User Tracking History Report" that the Clerk's Office uses to document these filings has been placed in the court's file at the direction of the undersigned and has also been marked as Court's Exhibits 1A-1J. Although there was some speculation that the recusal letters may have inadvertently been left out of that file, those documents are not critical to the issues raised in the Defendant's motion.

The other file that was given that same cause number was created by the District Attorney's Office Records Division in the grand jury on August 23, 2013. They erroneously

created that file before they realized that the District Attorney's office had recused itself from the case. Once that mistake was realized, that file was immediately turned over to the District Clerk, and both of these files were kept in one red rope folder in the District Clerk's office. That District Attorney grand jury file contained copies of the documents that were in the District Clerk's grand jury file.

Once the second Grand Jury returned an indictment on August 15, 2014, the District Clerk's office inadvertently assigned the case the captioned cause number, as opposed to the originally assigned cause number. However, the cause number issue did not hinder the public availability of the above discussed files, and until Defendant filed his Second Application for Pretrial Writ of Habeas Corpus And/Or Second Motion To Quash and Dismiss the Indictment in October, 2014, there had not been any requests for documents that were denied. Once the Defendant alleged that documents were missing, the undersigned notified the parties that all of the documents were available and would be provided to the parties during the status conference held on October 13, 2014. Those documents were provided in chambers to each of the parties on that date.

**It is important to note that the Attorney Pro Tem Oath of Office and the Statement of Officer (anti-bribery statement) have been on file with the Travis County District Clerk's office, and available to the public, since August 22, 2013.**[3]

At no time was this court aware of any previously made requests for any of the documents discussed in the Defendant's motion, and there do not appear to have been any Open Records requests made for this information. Once Defendant requested copies of all of the file documents, the court and District Clerk's office staff worked diligently and expeditiously to assemble all of the requested files and documents.

---

[3] This fact is critical to the issue of waiver as discussed herein beginning on page 14.

1. **<u>First Ground For Relief: No Written Order Appointing Attorney Pro Tem</u>**

Defendant acknowledges that there is no case or statute requiring that an Attorney Pro Tem's authority and duration of appointment must be in writing. The Texas Code of Criminal Procedure, Article 2.07, outlines the steps required for the appointment of an Attorney Pro Tem. Specifically, it states "(b-1) An attorney for the state who is not qualified to act may request the court to permit him to recuse himself in a case for good cause and upon approval is disqualified. (c) If the appointed attorney is not an attorney for the state, *he is qualified to perform the duties of the office for the period of absence or disqualification of the attorney for the state on filing an oath with the clerk of the court."* (emphasis added). However, defense counsel argued at the pre-trial hearing on November 6th that the requirement that there be a written order appointing Mr. McCrum as Attorney Pro Tem is "implicit in all the cases" that they have cited. (R.R. p. 14).

**This court concludes that the lack of a written order does not invalidate Mr. McCrum's appointment as Attorney Pro Tem.** *See, e.g., Ashlock v. State,* 2011 WL 1770893 (Tex.App.—Texarkana 2011, no pet.)("Article 2.07 of the Texas Code of Criminal Procedure, which controls the procedures for the appointment of an attorney pro tem, does not set forth a procedure for the removal of pro tem counsel. *No written order of appointment is explicitly required.* The pertinent language merely calls for the court to 'appoint any competent attorney to perform the duties of the office during the absence or disqualification of the attorney for the state.' … While a written order is certainly the preferred practice, we are not directed to case law which suggests or requires that the order of appointment or the grant of a motion to rescind a recusal under Article 2.07 be in writing.").

Defendant's position that a written order was required to effectuate Mr. McCrum's status as Attorney Pro Tem is not supported by case law or statutory authority. Therefore, this court concludes that Defendant's claim that the indictment should be dismissed because the Attorney Pro Tem appointment was invalid, due to the fact that it was not the subject of a written court order, is without merit.

**2. <u>Second Ground For Relief: Attorney Pro Tem's Signature Not On Oath of Office</u>**

It is Defendant's position that "the oath is the biggest issue [they] have because if Mr. McCrum did not properly qualify as an Attorney Pro Tem … everything he's done up to this point, everything his co-counsel has done up to this point, is absolutely void." (R.R. p. 15)

Defense counsel acknowledged, and it is thus undisputed, that the undersigned did in fact administer the Oath of Office to Mr. McCrum, and he repeated that oath, on August 19, 2013. (R.R. pp. 15-17). Defendant has taken issue with the fact that Mr. McCrum's signature is not on the Oath of Office, asserting that the lack of his signature invalidates the Oath of Office, the result being that Mr. McCrum's authority to act as Attorney Pro Tem is null and void. (R.R. pp. 15-17). Defendant also complains that the Oath was not properly filed with the clerk of the court and was not located in the proper file. (R.R p. 17).

As to Defendant's complaint that the Oath was not properly filed with, and located in, the office of the clerk of the court, this court finds such claim to be without merit. The Oath was filed with the District Clerk of Travis County on August 22, 2013, as shown by the file stamp on that document.

In response to the claims regarding the signature, the State counters that the Oath of Office form, which indicates that it must be signed by the "officer," is unclear. (R.R. p. 48). In light of the fact that the undersigned signed the Oath of Office on the blank line for the

"signature of officer," this court would obviously be inclined to agree with Mr. McCrum's argument that the form is unclear. Nevertheless, the fact that the undersigned's signature is on the Oath of Office, and Mr. McCrum's signature is not on the Oath of Office, does not control. Rather, it is the actual taking of the Oath of Office, not the signature, that satisfies Article 2.07. Nothing in Article 2.07 noted above actually requires a signature on the oath, it is the administration of the oath and filing it with the clerk that is required. **Therefore, given the fact that the parties do not dispute that Mr. McCrum did in fact *take* the Oath of Office, this court concludes that the lack of Mr. McCrum's signature on the Oath of Office does not invalidate his oath.**

In arriving at this conclusion, the court followed the Court of Criminal Appeals' reasoning in *Smith v. State,* 207 S.W.3d 787 (Tex.Crim.App. 2006). In *Smith*, the Court held that an officer's failure to sign a search warrant affidavit does not invalidate the warrant if other evidence proves that the affiant personally swore to the truth of the facts in the affidavit before the issuing magistrate. The court finds *Smith* to be instructive here, particularly in its analysis of what constitutes an oath, and whether a signature is vital to the validity of an oath:

> The purpose of this oath is to call upon the affiant's sense of moral duty to tell the truth and to instill in him a sense of seriousness and responsibility. When an individual swears under oath, society's expectation of truthfulness increases and the legal consequences for untruthfulness—prosecution for perjury, for example—may be severe. The purpose of the written affidavit is to memorialize the affiant's recitation of the facts, conclusions, and legal basis for the issuance of the search warrant. Without a written affidavit, citizens and courts would not be able to determine if the search warrant had been properly issued unless the affiant physically appeared before the trial judge after the search to recount the factual basis for requesting the search warrant. By then, the affiant may have relocated or for some other reason become unavailable. Even if the affiant were still available, his memory of both the specific facts and his conclusions may have faded. **The purpose of the affiant's signature,**





9

**however, is different. It memorializes the fact that he took the oath; it is not an oath itself.**

... We agree with *Vance* [*v. State,* 759 S.W.2d 498 (Tex.App.—San Antonio 1998, pet. ref'd)] and the majority of the out-of-state courts and hold that the failure to sign the warrant affidavit does not invalidate the warrant **if other evidence proves that the affiant personally swore to the truth of the facts in the affidavit before the issuing magistrate.**

... Although the affiant's signature on an affidavit serves as an important memorialization of the officer's act of swearing before the magistrate, **it is that act of swearing, not the signature itself, that is essential.**

(Emphasis added).

In this case, there is other evidence that Mr. McCrum personally swore to the Oath of Office. Further, this fact is undisputed by the defense. Hence, following the reasoning of *Smith,* this court concludes that Mr. McCrum's signature is not critical to the validity of the Oath of Office. This court finds that the Oath of Office is valid and confers authority upon Mr. McCrum to execute the duties of Attorney Pro Tem in this case.

Therefore, this court concludes that Defendant's claim that the indictment should be dismissed because Mr. McCrum's signature is not on the Oath of Office Form 2204 is without merit.

3. **Third Ground For Relief: Oath of Office Taken Before Statement of Officer (Anti-Bribery Statement) Was Signed and Filed With The Secretary of State**

Defendant's third complaint is that Mr. McCrum took the Oath of Office before he signed and filed the Statement of Officer (the anti-bribery statement). Defense counsel argued at the hearing that this means Mr. McCrum did not follow the letter of the law, which means that "[H]e cannot act. Game over." (R.R. p. 22).

Defendant is correct that the facts related to the order of administering and signing of both the Oath of Office and the Statement of Officer, and the filing thereof, are undisputed. This court finds, therefore, that Mr. McCrum was administered and repeated aloud the Oath of Office; that the undersigned signed the Oath of Office above the line signifying "Signature of Officer;" that Maria Salinas, a Notary Public for the State of Texas, witnessed and acknowledged the swearing of the Oath by Mr. McCrum; and that immediately thereafter Mr. McCrum signed the Statement of Officer. In other words, the documents were signed contemporaneously.

Article 16 of the Texas Constitution does instruct that the Statement of Officer (aka the anti-bribery statement) is to be signed and filed with the Secretary of State before taking the Oath of Office, and it is undisputed that this was not done.

The question, therefore, is whether the failure to strictly adhere to that instruction given in Article 16 voids all actions taken by Mr. McCrum as Attorney Pro Tem in this case. **Based upon the case law discussed below, this court concludes that Mr. McCrum's authority was not voided by the procedural irregularities in how and when the Oath of Office and Statement of Officer were administered and filed.**

In *Espinoza v. State,* 115 S.W.3d 64 (Tex.App.—San Antonio 2003, no pet.), the defendant filed a pre-trial motion to quash his indictment, alleging that several of the officers involved in the proceedings, including the visiting judge, had failed to take the anti-bribery oath. The court noted that "under the Texas Constitution, all appointed officers must sign an anti-bribery statement and file it with the Secretary of State before taking the oath of office," and "any actions conducted in violation of this provision *may* be considered void." *Espinoza, 115 S.W.3d at 66* , *citing to Davis v. State,* 956 S.W.2d 555, 558-59 (Tex.Crim.App. 1997) and *Prieto Bail Bonds v. State,* 994 S.W.2d 316, 318 (Tex.App.—El Paso, 1999, pet. ref'd)(where the judge

wholly failed to take the required oaths). In *Espinoza,* the court noted that a challenge to the judge's authority may not be made collaterally through a motion to quash, but must be made by bringing a direct action through a *quo warranto* proceeding. Without addressing the vehicle Defendant used in this case to challenge Mr. McCrum's authority, this court agrees with the court's analysis in *Espinoza* addressing whether the Defendant proved that the judge was disqualified under the Constitution. The record in that case showed that the judge took the required anti-bribery oath, but failed to file the oath with the Secretary of State in a timely manner. The court held that the failure to timely file the anti-bribery oath with the Secretary of State is not sufficient to render the oath void, and "does not vitiate the oath or deprive the judge of the authority to preside" in that case. The court was satisfied that "the oath substantially complied with the constitutional provisions, thereby rendering the failure to file insufficient to disqualify him."[4]

Similarly, in *Gonzalez v. State,* 938 S.W.2d 482 (Tex.App-El Paso 1996, pet. ref'd), the court noted that "even a flawed attempt to take the oath of office may be sufficient." In *Gonzalez,* although the anti-bribery statement was not timely filed and the oath of office was premature, the oaths were in fact taken and witnessed, and substantial compliance with the

---

[4] *Id., citing to In re Gen. Elec. Capital Corp.,* 63 S.W.3d 568, 571-72 (Tex.App. El Paso 2002, pet. stricken)(The judge's failure to file the anti-bribery oath before taking his oath of office did not invalidate the judge's authority); *Soderman v. State,* 915 S.W.2d 605, 612 (Tex.App.—Houston [14th Dist.] 1996, writ ref'd)(The fact that the justice of the peace who issued arrest warrant and police officer who arrested defendant failed to file anti-bribery statement before taking their oaths of office did not compel finding that warrant and arrest were invalid). *See also, Johnson v. Mohammed,* 2013 WL 1955862 (Tex.App.—Austin 2013, writ dism'd w.o.j.)(Johnson asserts that the filed oath forms are invalid because they lack a clerk's seal or time of filing, vary in wording from the language in the constitution, or were not completed by a notary and that the oaths may not have been taken in the proper order or filed as required. The court noted that even if Johnson had timely raised her complaints, such defects do not disqualify the judges.), *citing to Thomas v. Burkhalter,* 90 S.W.3d 425, 426–27 (Tex.App.-Amarillo 2002, pet. denied) (even if oath of office and anti-bribery oath were not filed with Secretary of State, "that does not establish that they were not taken. Conceivably, they could have been taken and not filed. So, even if we were to judicially notice the contents of the Secretary's records and discovered no oaths, their absence does not prove they were never taken. And, most importantly, simply failing to file an oath that has been taken does not deprive the official of his authority.").

Constitutional requirement was sufficient. The trial court made the following conclusions of law, which were affirmed by the Eighth Court of Appeals:

> The manner in which Carter undertook the two required oaths does not seem to fully comply with all the requirements of Texas Constitution, Article 16, Section 1. Article 16, Section 1, requires that an appointed officer first files with the Secretary of State an anti-bribery statement. Once the anti-bribery statement has been filed the appointed officer may take the oral oath of office before any person qualified to administer an oath in the State of Texas. After the procedure of filing and taking the oaths of office is completed the appointed officer may then enter into duties of office in a de jure status. Since Carter failed to first file the anti-bribery statement before taking his oath of office, the subsequent taking of such oath was premature. Without having fully complied with Article 16, Section 1, Carter entered into his duties as judge, including the signing of the bond order in this case.
>
> **Carter's attempt to take the oath of office, albeit flawed, was sufficient to clothe him with the authority of a de facto judge. Although the anti-bribery statement was not timely filed and the oath of office was therefore premature, both oaths were in fact taken and witnessed. Carter assumed office in an open and public manner, under color of authority. These factors satisfy the requirements for de facto judicial authority. Therefore, his order setting bond was valid and the bond arising therefrom is also a valid and binding undertaking.**

(Emphasis added).

In *Itz v. State,* 2001 WL 840179 (Tex.App.—San Antonio 2001, no pet.), as in this case, the oath of office and anti-bribery statement were both signed on the same day, and the anti-bribery statement was stamped as filed with the Secretary of State six days later. The court declined to hold that this rendered the judge constitutionally disqualified from acting as a judicial officer. "At most, it is a procedural irregularity. The acts of a judge who is qualified and not constitutionally or statutorily disqualified are not void because of procedural irregularities." *Id., citing to Davis,* 956 S.W.2d at 559. *See also, Singletary v. State,* 1997 WL 424431 (Tex.App.—Dallas 1997, no pet.)("Appellant cites no authority, and we have found none, that submitting

these written [anti-bribery] statements after taking the oath of office renders an officer's oath invalid. We agree with the *Soderman* court that the mere failure to file an "anti-bribery" statement does not render an officer's acts unlawful.")[5]

Defendant cites to *Stine v. State,* 908 S.W.2d 429 (Tex.Crim.App. 1995) as authority that Constitutional provisions are mandatory. This court finds *Stine* to be distinguishable because the constitutional provision that was not complied with in that case was a "jurisdictional mandate that must be followed." In this case, the order of the taking and filing of the oaths was not jurisdictional. Moreover, *Stine* has been overruled by implication as it pertains to the issue of harm analysis. *See Cain v. State,* 947 S.W.2d 262 (Tex.Crim.App. 1997). Moreover, the court finds *Prieto Bail Bonds v. State,* 994 S.W.2d 316, 318 (Tex.App.—El Paso, 1999, pet. ref'd) distinguishable because in that case the judge completely failed to take the required oaths.

**4. <u>The Issue of Waiver</u>**

The court believes that the case law cited herein supports its decision to deny the Defendant's claim for relief for reasons that are more persuasive than the waiver doctrine.[6] Nevertheless, many of these cases discuss the issue of waiver. In *State v. Newton,* 158 S.W.3d 582 (Tex.App.—San Antonio 2005, pet. dism'd), the court cited to *Marin v. State,* 851 S.W.2d

---

[5] *See also, Sykes v. State,*2004 WL 392874 (Tex.App.—Austin 2004, pet. ref'd), in which the defendant urged that her conviction was void because the public officials responsible for taking her confession, gathering the evidence at the scene, securing her consent to search, and prosecuting her case each failed to qualify for their office. She claimed that they failed to take the anti-bribery oath and renew their constitutional oaths as required by the Texas Constitution. The court held that "the failure of the officers to take their anti-bribery oaths or renew their constitutional oaths and the failure of one prosecuting attorney to execute the correct oath of office does not affect their status as de facto public officers." The court held that these officers were acting under color of a known and valid appointment, and the failure to conform to "some precedent requirement such as taking an oath" does not invalidate their actions.

[6] As discussed herein, this court believes that the actions taken by Mr. McCrum regarding the presentment of this case to the Grand Jury are not invalidated by the alleged procedural irregularities associated with his appointment and oath. The court believes that, because both oaths were in fact taken, there was substantial compliance with the Constitutional requirement under Article 16, and thus Mr. McCrum was not without authority to act in this case.

275 (Tex.Crim.App. 1993), and addressed the waiver issue in the context of the Attorney Pro Tem's authority when there are irregularities in taking the oath of office:

> In 2002, the Waco Court of Appeals held in *Marbut v. State,* 76 S.W.3d 742 (Tex.App.-Waco 2002, pet. ref'd), that a defendant must object in the trial court to procedural violations in appointing an attorney pro tem or that defendant waives the issue. In *Marbut,* although there were several procedural violations in appointing the attorney pro tem, the court held that the defendant waived this issue by failing to object in the trial court. *Id.* at 749; *see also Stephens v. State,* 978 S.W.2d 728, 730 (Tex.App.-Austin 1998, pet. ref'd) (holding that appellant's failure to object in trial court to attorney pro tem's failure to meet the requirements of article 2.07 waived any error). In doing so, the Waco Court of Appeals relied on the court of criminal appeals' opinion in *Marin v. State,* 851 S.W.2d 275, 279 (Tex.Crim.App.1993), *overruled on other grounds by Cain v. State,* 947 S.W.2d 262 (Tex.Crim.App.1997).
>
> In *Marin,* the court of criminal appeals recognized that a defendant's rights arose from distinct rules that generally fall into one of three categories: (1) absolute requirements and prohibitions; (2) rights which must be implemented by the system unless expressly waived; and (3) rights which are implemented only upon request and therefore can be forfeited. *Id.* The court noted that the third category includes rights that arise from rules that are optional at the request of a defendant. *Id.* at 278. Texas Rule of Appellate Procedure 33.1 applies only to these rights; the judge must implement them only on request of a party, and they will be forfeited if no complaint is made at trial. *Id.* at 280. Ordinary objections to evidence and procedural benefits are included in this category. *Id.*
>
> In finding that rule 33.1 applies to a defendant's complaint about an attorney pro tem under article 2.07, the Waco Court of Appeals explained:
>
> **Article 2.07 does not concern the jurisdiction of the trial court or the constitutionality of a statute. *Marin,* 851 S.W.2d at 279. Furthermore, a defendant's right to have a prosecutor qualified under article 2.07 to represent the State is not a right "so fundamental to the proper functioning of our adjudicatory process" that it cannot be forfeited. *Id.* at 278. Article 2.07 sets out a procedural process for the appointment of an ad hoc district attorney. If those procedures are not properly followed, the defendant should object. Failure to do so, under rule 33.1, forfeits the complaint on appeal.** *Marbut,* 76 S.W.3d at 750. Thus, the Waco Court of Appeals held that a defendant must object to the attorney pro tem's failure to comply with article 2.07 in the trial court. *Id.*

(Emphasis added).

Defendant seeks to invalidate the actions of the Attorney Pro Tem dating back to the inception of his work before the Grand Jury. However, Defendant did not raise the complaint regarding the Attorney Pro Tem's oath until he filed his motion on or about October 3, 2014. Although copies of the Attorney Pro Tem's Oath of Office and the Statement of Officer were on file with the Travis County District Clerk as of August 22, 2013, (and the Statement of Officer was on file with the Secretary of State on August 19, 2013), there were no objections made at that time regarding the oaths, or objections made to the authority of the Attorney Pro Tem with regard to his actions taken in this case. This court finds, therefore, that Defendant has waived his complaint regarding the authority of the Attorney Pro Tem to act, if one ever existed.[7] With that said, the Attorney Pro Tem has adequate opportunity to "take appropriate corrective action." *See Wilson v. State,* 977 S.W.2d 379, 380-81 (Tex.Crim.App. 1998).

For the reasons noted herein, this court hereby DENIES Defendant's Second Writ/Second Motion To Quash, effectively OVERRULING Defendant's objections to the alleged procedural irregularities related to the appointment of the Attorney Pro Tem and the oaths taken by the Attorney Pro Tem.

SIGNED AND ORDERED ON November 18, 2014.

Respectfully submitted,

Judge Bert Richardson
Judge Presiding By Assignment

---

[7] *See State v. Ford,* 158 S.W.3d 574, 581 (Tex.App.—San Antonio 2005, pet. dism'd)("By holding that the defendant must object to preserve error, these cases are, in essence, holding that the actions of the attorney pro tem or the trial court are voidable, not void. Here, if Rudkin's actions are voidable and the defendant did not object below, was Rudkin a de facto attorney pro tem with the authority to 'make an appeal'? We believe so. Newton and Ford's failure to object below clothed Rudkin with authority to act as attorney pro tem, and as a de facto attorney pro tem, Rudkin's notice of appeal invokes the jurisdiction of this court.)

DISTRICT COURT OF TRAVIS COUNTY TEXAS