NO. D1DC14-100139

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

ORDER
DENYING DEFENDANT'S FIRST MOTION TO QUASH AND DISMISS THE INDICTMENT
AND
GRANTING THE STATE LEAVE TO AMEND COUNT II OF THE INDICTMENT
AS DIRECTED

On August 15, 2014, the Grand Jury for the County of Travis, State of Texas, returned an indictment against Defendant James Richard "Rick" Perry. The indictment charges two counts. Count I alleges a violation of TEX. PENAL CODE Section 39.02 Abuse of Official Capacity, and Count II alleges a violation of TEX. PENAL CODE Section 36.03 Coercion of Public Servant.[1]

On September 8, 2014, Defendant, through his counsel of record, filed Defendant's First Motion To Quash And Dismiss The Indictment. This motion states that it "contains a

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1 TEX. PENAL CODE sec. 36.03(b) states that "an offense under this section is a Class A misdemeanor unless the coercion is a threat to commit a felony, in which event it is a felony of the third degree." **Although it has not been raised by Defendant, the court wishes to clarify its perception that Count II is being alleged as a Class A misdemeanor, not as a third degree felony.** The court's reading of Count II as a Class A misdemeanor, and not as a third degree felony, is based upon two things. First, the alleged "threat" is not charged in the indictment as "a threat to commit a felony." The term "felony" is nowhere found in Count II, and if the State believes that it has alleged "coercion" as a threat to commit the felony of abuse of official capacity as charged in Count I, the indictment is not so worded. A defendant is entitled to "notice of the particular offense with which he is charged." TEX. CODE CRIM. PROC. art. 21.11. Second, the last line of Count II includes the phrase, "such offense having been committed by defendant, a public servant, while acting in an official capacity as a public servant." Defendant "acting in an official capacity as a public servant" is not an element of a Section 36.03(a)(1) offense, but it is required to bring the alleged "threat" within the Section 1.07(a)(9)(F) definition of "coercion." Thus, the omission of the wording "threat to commit a felony," coupled with the inclusion of the charge that Defendant was acting in *his* official capacity, leads to the logical conclusion that Count II is being indicted as a threat "to take or withhold action as a public servant" (TEX. PENAL CODE Section 1.07(a)(9)(F)), which is a Class A misdemeanor. Such language also brings the charged offense within the jurisdiction of this court under TEX. CODE CRIM. PROC. art. 4.05 (" . . . [C]riminal district courts shall have original jurisdiction in criminal cases . . . of all misdemeanors involving official misconduct.") In any event, the grade of the offense charged in Count II has never been raised as an issue by Defendant, and thus any confusion regarding the grade of the offense alleged in Count II is not an issue before the court.

substantially verbatim recitation of some, but not all, of the grounds contained in Governor Perry's Application for Pretrial Writ of Habeas Corpus filed on August 25, 2014." (*Motion to Quash, page 1*). Defendant also claims in his motion to quash that the charges in the indictment violate the Constitution.

The chronology of what has taken place so far in this case was set out in this court's Order Relating to Authority of Attorney Pro Tem. The issues presented in Defendant's First Motion To Quash And Dismiss The Indictment are legal issues, and therefore no evidentiary hearing is required.[2]

For the following reasons, which are fully discussed herein, the court DENIES the Defendant's First Motion To Quash And Dismiss The Indictment as to Counts I and II:

Defendant's Challenges to the Constitutionality of the Statutes: Defendant's grounds for relief based upon "as applied" challenges to the constitutionality of the penal statutes under which Defendant has been charged are not cognizable at this stage of the case. Texas law clearly precludes a trial court from making a pretrial determination regarding the constitutionality of a state penal or criminal procedural statute as that statute applies to a particular defendant, regardless of whether such claim is raised in an application for pretrial writ of habeas corpus or

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2 Defendant's motion is not attacking the pre-indictment process, but rather is attacking, among other things, the substance of the wording of the indictment. *See, e.g., State v. Flournoy,* 187 S.W.3d 621, 624 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (The trial court dismissed 39 indictments without holding a hearing, essentially finding that the indictments were invalid because the grand jury was not authorized to hand down the indictments. The appellate court reversed and remanded the cases to the trial court to hold a hearing on the motions to quash, stating that the trial court judge "should have held a hearing to determine whether the motion to quash should have been granted as to each case.") (citing *Ray v. State,* 561 S.W.2d 480, 481 (Tex. Crim. App. 1977) (a hearing should have been held on motion to quash indictment due to defect in pre-indictment process)); *State v. Goldsberry,* 14 S.W.3d 770, 772 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (requiring motions to quash to be in writing to give the State an opportunity to amend indictment or "to prepare for a hearing on such issue"). *Flournoy* is inapplicable here because Defendant is not attacking the pre-indictment process. This court does not believe that a hearing is necessary because the legal arguments have already been presented in writing by the parties. Moreover, both sides were made aware of the timing of the court's ruling on the motion to quash, and neither side at that time raised the issue of having a hearing or objected to the court's failure to hold a hearing.

in a motion to quash the indictment.

Defendant's Challenges to the Constitutionality of Count I: Defendant's claims challenging the constitutionality of Count I are based upon allegations that are not actually contained in Count I; thus, the court is not able to grant relief based upon such complaints. Specifically, Count I does not state that Defendant misused property by vetoing legislation. Therefore, the issue of whether Defendant's veto was in violation of Section 39.02(a)(2) is not before this court. Furthermore, Defendant's motion to quash Count I contains no claim that Count I is too vague, or lacks specificity, or gives Defendant insufficient notice for preparation of his defense. Therefore, Defendant has not presented in his motion to quash Count I any challenges to the sufficiency of the indictment upon which the court can grant him relief.

Defendant's Challenges to the Constitutionality of Count II: Defendant's motion to quash Count II does challenge the failure to properly negate the exception under TEX. PENAL CODE Section 36.03(c). Finding that Count II does not properly negate the exception, the court sustains Defendant's purported objection to Count II. Although the State did not file a formal motion for leave to amend Count II, the State asserts in its response to Defendant's motion to quash that it should be given an opportunity to amend the indictment to cure any such defect. The court agrees that amending Count II of the indictment is the proper remedy here, rather than setting it aside. The court therefore DENIES Defendant's First Motion to Quash Count II on that basis, and GRANTS the State leave to amend Count II to properly negate the exception under TEX. PENAL CODE Section 36.03(c). The court further notes that, while TEX. CODE CRIM. PROC. art. 28.10 allows the State to amend the indictment "at any time before the date the trial on the merits commences," this court cautions the State that Count II is subject to being quashed if not amended in a timely fashion to properly negate the exception. Since the State is allowed to

amend Count II to properly negate the exception, Defendant's claims challenging the constitutionality of Count II are premature.

DEFENDANT'S GROUNDS FOR RELIEF

Defendant states that his First Motion To Quash And Dismiss The Indictment "is being filed [to] afford the Court with a full, fair and complete opportunity to resolve all of the constitutional issues contained in the Application." *(Motion to Quash, page 1)* Further, referring to the two statutes, TEX. PENAL CODE Sections 39.02(a)(2) and 36.03(a)(1), Defendant asserts that "[t]hese particular provisions are unconstitutional as a matter of law, *as applied* to the facts alleged in the indictment, Governor Perry, or any Texas Governor, as they attempt to criminalize a constitutionally authorized veto, and an alleged 'threat' of that veto." *(Motion to Quash, pgs. 2-3)*

As to Count I of the indictment, Defendant states that "[e]ach of the nine grounds asserted in Governor Perry's Application are repeated verbatim, as grounds upon which this 'first' motion to quash and dismiss must be granted." Those grounds are:

1. As to Count I, Section 39.02(a)(2) violates the Fifth and Fourteenth Amendments to the Constitution of the United States as applied because its prohibition of "misuse" of "government property . . . that has come into the [Governor's] custody or possession" is unconstitutionally vague as a matter of law if extended to a mere gubernatorial veto of any appropriation of State funds.

2. As to Count I, Section 39.02(a)(2) violates Article I, Sections 10 and 19 of the Texas Constitution as applied because its prohibition of "misuse" of "government property . . . that has come into the [Governor's] custody or possession" is unconstitutionally vague as a matter of law if extended to a mere gubernatorial veto of any appropriation of State funds.

3. As to Count I, Section 39.02(a)(2) is unconstitutional as applied because it infringes upon the Governor's absolute constitutional right and duty to approve or disapprove "items of appropriation" under Article IV, Section 14 of the Texas Constitution.

4. As to Count I, Section 39.02(a)(2) is unconstitutional as applied because it violates the separation of powers between the various departments of government that is guaranteed

to the People by Article II, Section 1 of the Texas Constitution.

5. As to Count I, because a governor acts in a constitutionally- prescribed legislative capacity in vetoing legislation, Section 39.02(a)(2) is unconstitutional as applied because it violates the protection afforded by the Speech or Debate Clause of Article III, Section 21 of the Texas Constitution.

6. As to Count I, because the Governor was acting in a legislative capacity in vetoing the appropriation at issue, Count I of the indictment is void because it is necessarily based on evidence privileged by the Speech or Debate Clause of Article III, Section 21 of the Texas Constitution.

7. As to Count I, because the Governor was acting in a legislative capacity in vetoing the appropriation at issue, trial on Count I of the indictment is barred as a matter of law because the State could only sustain its burden, if at all, by introducing evidence privileged by the Speech or Debate Clause of Article III, Section 21 of the Texas Constitution.

8. As to Count I, Section 39.02(a)(2) is unconstitutional as applied because Governor Perry had the right to do any and all acts of which he is charged in the exercise of his rights under the Free Speech guarantee of the First Amendment to the Constitution of the United States.

9. As to Count I, Section 39.02(a)(2) is unconstitutional as applied because Governor Perry had the right to do any and all acts of which he is charged in the exercise of his rights under the Free Speech guarantee of Article I, Section 8 of the Texas Constitution.

Additionally, in Paragraph VIII of his First Motion to Quash, Defendant claims that Section 39.02(a)(2) is unconstitutional "as applied."

As to Count II of the indictment, Defendant states that "[o]nly the last eight of the twelve grounds asserted in Governor Perry's Application are repeated verbatim, as grounds upon which this 'first' motion to quash and dismiss must be granted."[3] Those grounds are:

1. As to Count II, Section 36.03(a)(1) violates the First, Fifth, and Fourteenth Amendments to the United States Constitution because it is unconstitutionally vague as applied.

2. As to Count II, Section 36.03(a)(1) violates Article I, Sections 8, 10, and 19 of the Texas Constitution because it is unconstitutionally vague as applied.

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3 Defendant states that the first four claims for relief as to Count II in the pretrial writ application are facial challenges to the constitutionality of Section 36.03(a)(1) and are not raised in the motion to quash.

3. As to Count II, Section 36.03(a)(1) violates the First, Fifth, and Fourteenth Amendments to the United States Constitution because it is unconstitutionally overbroad as applied.

4. As to Count II, Section 36.03(a)(1) violates Article I, Sections 8, 10, and 19 of the Texas Constitution because it is unconstitutionally overbroad as applied.

5. As to Count II, Section 36.03(a)(1) is unconstitutional as applied because it infringes upon the Governor's absolute constitutional right and duty to approve or disapprove "items of appropriation" under Article IV, Section 14 of the Texas Constitution.

6. As to Count II, Section 36.03(a)(1) is unconstitutional as applied because it violates the separation of powers between the various departments of government that is guaranteed to the People by Article II, Section 1 of the Texas Constitution.

7. As to Count II, Section 36.03(a)(1) is unconstitutional as applied because it violates the Speech or Debate Clause of Article III, Section 21 of the Texas Constitution.

8. Count II of the Indictment is void as a matter of law because, contrary to requisites of Section 2.02(b) of the Penal Code, it makes no attempt to negate the statutory exception set forth in Section 36.03(c) for "a member of the governing body of a governmental entity," which includes Governor Perry's actions as a member of the Legislative Department with regard to his actions in approving or disapproving of "items of appropriation" under Article IV, Section 14 of the Texas Constitution.

In Paragraph VII of his First Motion to Quash, Defendant claims that Section 36.03(a)(1) is unconstitutional "as applied."

In Paragraph V, Defendant claims that the indictment violates the Constitutional Separation of Powers.

In Paragraph VI, Defendant claims that the indictment violates the "Speech or Debate" Clause.

THE TRIAL COURT IS WITHOUT AUTHORITY TO REVIEW THE MERITS OF DEFENDANT'S PRETRIAL "AS APPLIED" CHALLENGES TO THE CONSTITUTIONALITY OF TEXAS PENAL CODE SECTIONS 39.02(a)(2) AND 36.03(a)(1)

As stated in this court's Order Denying Defendant's Application For Pretrial Writ of Habeas Corpus, under Texas law, a trial court has no authority to consider pretrial the merits of an "as applied" challenge to the constitutionality of a statute. This is true whether the "as

applied" challenge is raised in an application for pretrial writ of habeas corpus or in a motion to quash the indictment. *State ex rel. Lykos v. Fine,* 330 S.W.3d 904, 911 (Tex. Crim. App. 2011) ("An 'as applied' challenge is brought during or after a trial on the merits, for it is only then that the trial judge and reviewing courts have the particular facts and circumstances of the case needed to determine whether the statute or law has been applied in an unconstitutional manner. Since a contention that a statute is unconstitutional as applied requires a recourse to evidence, it cannot be properly raised by a pretrial motion to quash the charging instrument."); *Gillenwaters v. State,* 205 S.W.3d 534, 536-37 n. 4 (Tex. Crim. App. 2006) (noting that trial court properly overruled pretrial motion to quash, but that defendant renewed his "as applied" challenge both at the end of all evidence and in a motion for new trial).[4]

As in *Lykos*, Defendant in this case "has cited no [Texas] state law or state procedure that permits a pretrial evidentiary hearing to determine the 'as applied' constitutionality of a state penal law or state criminal procedural statute . . . . He is, in truth, seeking a declaratory judgment." Because there is no basis under Texas law to conduct a pretrial evidentiary hearing to determine the "as applied" constitutionality of a state penal or criminal procedural statute, the trial court does not have legal authority to conduct such a pretrial evidentiary hearing or to make any such pretrial "declaratory judgment." If this court were to hold such a hearing or grant relief on the basis of Defendant's "as applied" constitutional challenges**, it would be acting "beyond the scope of [its] lawful authority."** *State ex rel. Lykos v. Fine,* 330 S.W.3d at 919.

Defendant asserts that *State v. Hanson*, 793 S.W.2d 270 (Tex. App.—Waco 1990, no

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4 There were several amicus briefs filed in this case. One amicus brief was properly filed by Counsel for Amici Curiae and is contained in the court's file, but the title of that brief indicates that it pertains only to the Defendant's Application for Pretrial Writ of Habeas Corpus. The other amicus briefs were not properly filed. Many of those briefs were authored by inmates (arguing both in favor and against the State), and at least one brief was authored by a person held in a prior case to be a "vexatious litigant." Those briefs were not considered by the court.

pet.) mandates that Count II be dismissed. In *Hanson,* the Tenth Court of Appeals held that TEX. PENAL CODE Section 36.01(1)(F)—which contained the definition of "coercion" that is now in TEX. PENAL CODE Section 1.07(a)(9)(F)—was unconstitutionally vague when applied to Judge Hanson's alleged violation of TEX. PENAL CODE Section 36.03. The facts of *Hanson* appear similar to the facts in this case (as Defendant believes them to be), and thus Defendant places great emphasis on the *Hanson* decision. However, as explained below, *Hanson* is not controlling.

In *Hanson,* the State appealed an order quashing and dismissing two misdemeanor indictments charging Bosque County Judge Regina Hanson with attempting to coerce a public servant. The State had alleged that Judge Hanson intentionally and knowingly threatened to terminate the county's funding of the salaries of a deputy district clerk and an assistant district attorney in an attempt to coerce the district judge into firing the county auditor, and coerce the county attorney into revoking a misdemeanant's probation. The court examined the definition of "coercion" used in Section 36.01, and the offense of coercion of a public servant in Section 36.03(a)(1), noting that "threats may portend either lawful or unlawful action," and "First Amendment protection is extended to the former but not the latter . . . . Therefore, a criminal statute that seeks to punish threats must clearly distinguish between an actionable or true threat [of unlawful action] and protected speech [the threat of lawful action]." *Id.* at 272. The court held that "Judge Hanson had to guess at the meaning of section 36.03(a)(1) and its application to her official conduct because section 36.01(1)(F) failed to give fair warning of the nature of the threat prohibited." *Id.* The court analyzed the constitutionality of the two statutory provisions as they applied, in conjunction with each other, to Judge Hanson, and held that "Section 36.01(1)(F) was unconstitutionally vague when applied to Judge Hanson's alleged conduct, [and] [t]his

constitutional defect was transmitted to section 36.03(a)(1) by the impermissibly vague definition of 'coercion.' These penal provisions violated due process because they did not give Judge Hanson fair notice of what type of threat was prohibited, failed to provide a clear, objective standard by which those charged with enforcement could assess her alleged conduct for its legality, and had a potential of inhibiting the exercise of her protected free expression as a public official." *Id.* at 272-273.[5]

Significantly, every case decided by the Texas Court of Criminal Appeals since *Hanson* has held that an "as applied" challenge to the constitutionality of a statute is not permitted at the pretrial stage.[6] Thus *Hanson* does not provide controlling authority for this court to conduct an "as applied" constitutional analysis at this time.

Defendant's nine grounds for relief under Count I and the first seven grounds for relief under Count II, as well as many of the claims included in Paragraphs V through VIII, are clearly based upon "as applied" challenges to the constitutionality of the statutes.[7] Therefore, because this court is without authority at this time to rule on the merits of Defendant's motion to quash on the grounds for relief claiming that TEX. PENAL CODE Sections 39.02(a)(2) and 36.03(a)(1) are being unconstitutionally applied to Defendant, such grounds for relief raised in Defendant's First Motion To Quash and Dismiss the Indictment are DENIED.

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5 It should be noted that Section 36.03 was amended after *Hanson* to include the 36.03(c) exception. The 36.03(c) exception arguably solves what was Judge Hanson's dilemma of having to "guess at the meaning of section 36.03(a)(1) and its application to her official conduct because section 36.01(1)(F) failed to give fair warning of the nature of the threat prohibited." *Id.* at 272. The 36.03(c) exception allows for the constitutionally protected speech that falls under "protected political debate." The court in *Hanson* acknowledged that "an unconstitutional statute can be amended to thereafter make it constitutional."

6 There was no petition for discretionary review filed in *Hanson*.

7 Although grounds for relief 6 and 7 (as well as the constitutional arguments presented throughout the body of the motion) may not use the term "as applied," they allege that Count I is void or barred as a matter of law because it violates the Speech or Debate Clause (and the Separation of Powers Clause). To the extent that such claims require an "as applied" analysis, they are not cognizable pretrial.

DEFENDANT'S FIRST MOTION TO QUASH AND DISMISS THE INDICTMENT DOES NOT CHALLENGE THE SUFFICIENCY OF THE INDICTMENT

The sufficiency of a charging instrument presents a question of law. *Smith v. State,* 309 S.W.3d 10, 13-14 (Tex. Crim. App. 2010); *State v. Moff,* 154 S.W.3d 599 (Tex. Crim. App. 2004). A motion to quash is the proper way to challenge the sufficiency of the wording in the indictment. A charging instrument must convey sufficient notice to allow the accused to prepare his defense. *See* TEX. CODE CRIM. PROC. art. 21.03 ("Everything should be stated in an indictment which is necessary to be proved."); *State v. Mays,* 967 S.W.2d 404, 406 (Tex. Crim. App. 1998).

TEX. CODE CRIM. PROC. art. 21.11 states as follows:

> An indictment shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court, on conviction, to pronounce the proper judgment . . .

Thus, an indictment must allege, in plain and intelligible language, all the facts and circumstances necessary to establish all the material elements of the offense charged. *See* TEX. CODE CRIM. PROC. art. 21.02(7) (requiring that "the offense must be set forth in plain and intelligible words").

Generally, an indictment that tracks the language of the penal statute will be legally sufficient. *State v. Mays,* 967 S.W.2d 404, 406 (Tex. Crim. App. 1998); *DeVaughn v. State,* 749 S.W.2d 62, 67 (Tex. Crim. App. 1988); *Clark v. State,* 577 S.W.2d 238, 240 (Tex. Crim. App. 1979); *Womack v. State*, 2010 Tex. App. LEXIS 5166, 2010 WL 2679978 (Tex. App.—San Antonio 2010, no pet.) (mem. op., not designated for publication) (The court held that specific reference to which of the four statutorily-enumerated definitions of "fiduciary" was unnecessary because simply tracking the language of the statute in the indictment was sufficient to notify

defendant of the nature of the duty he allegedly breached.); *Nix v. State,* 401 S.W.3d 656 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) ("Generally, added specificity is required in the indictment only where 'additional information . . . is reasonably necessary for the defense to prepare its case.'"); *see also Thomas v. State,* 621 S.W.2d 158, 161 (Tex. Crim. App. 1980) (op. on reh'g) ("The general rule is that a motion to quash will be allowed if the facts sought are essential to giving notice.")

In addition, the trial court is not permitted go behind the face of the indictment and use the anticipated evidence to decide the motion to quash. *State v. Gollihar,* 2010 Tex. Crim. App. LEXIS 1205, 2010 WL 3700790 (Tex. Crim. App. 2010) (mem. op., not designated for publication).

However, "if the statutory language is not completely descriptive, so that particularity is required to afford the defendant notice as required, merely tracking the language of the statute may be insufficient." *State v. Mays,* 967 S.W.2d at 406, (citing to *Daniels v. State,* 754 S.W.2d 214, 281 (Tex. Crim. App. 1988)).[8]

Nevertheless, it is error to consider challenges to the sufficiency of an indictment that are *not* in writing. TEX. CODE CRIM. PROC. art. 27.10 provides that all motions to set aside an

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8 *See also, State v. Campbell,* 113 S.W.3d 9, 13 (Tex. App.—Tyler 2000, pet ref'd) ("If the statutory language is completely descriptive of the offense so as to inform the accused of the charge against them, tracking the statutory language would be sufficient; however, if the statutory language is not completely descriptive so that greater particularity is required, then merely tracking the statute would be insufficient." (citing *Haecker & Doyle, infra*). *See also Amaya v. State,* 551 S.W.2d 385 (Tex. Crim. App. 1977); *Miller v. State,* 677 S.W.2d 737, 741-42 (Tex. App.—Corpus Christi 1984, no pet.); *Castillo v. State,* 689 S.W.2d 443, 449 (Tex. Crim. App. 1985) ("When considering a motion to quash the indictment, it is not sufficient to say the defendant knew with what offense he was charged; rather, the question presented is whether the face of the indictment or charging instrument sets forth in plain and intelligible language sufficient information to enable the accused to prepare his defense."); *Doyle v. State,* 661 S.W.2d 726, 730 (Tex. Crim. App. 1984) (failing to allege the manner and means used to communicate the threat in a retaliation case); *Miller v. State,* 647 S.W.2d 266, 267 (Tex. Crim. App. 1983) (failing to more specifically allege "damage and destroy" in criminal mischief case); *Cruise v. State,* 587 S.W.2d 403, 405 (Tex. Crim. App. 1979) (failing to allege manner and means of causing bodily injury in an aggravated robbery); *Haecker v. State,* 571 S.W.2d 920 (Tex. Crim. App. 1978) (failing to allege more specifically the manner and means of "torture" in cruelty to animals allegation).

indictment must be in writing. "Article 27.10 serves two purposes. First, written notification assures adequate notice to the State either allowing . . . an opportunity for amendment, or providing the State an opportunity to prepare for a hearing on such issue . . . . Second, written notification preserves any error for appellate review." *State v. Goldsberry,* 14 S.W.3d 770, 775 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (finding that all motions to set aside an indictment must be in writing, and granting a motion to quash on grounds that are not presented in writing would be error) (citing to *State v. Abrego,* 974 S.W.2d 177, 179 (Tex. App.—San Antonio 1998, no pet.) (reversing trial court's granting of defendant's oral motion to quash); *State v. Harbour,* 2005 WL 2009542, 2005 Tex. App. LEXIS 6819 (Tex.App.—Dallas 2005, no pet.) (mem. op., not designated for publication) ("To the extent the trial court's ruling was based on grounds that were outside the scope of the written motion, the trial court erred."); *State v. York,* 31 S.W.3d 798 (Tex. App.—Dallas 2000, pet. ref'd) (finding that to the extent the trial court quashed the informations based on York's oral motion, it erred).

A. <u>The Sufficiency of Count I</u>

Count I of the Indictment alleges that:

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

Count I alleges a violation of TEX. PENAL CODE Section 39.02(a)(2), Abuse of Official Capacity, which states, in pertinent part, that "a public servant commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly

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misuses government property . . . that has come into the public servant's custody or possession by virtue of the public servant's office or employment." Section 39.01(2) defines "misuse" as "deal[ing] with property contrary to, among other things, (A) an agreement under which the public servant holds the property; or (B) . . . an oath of office of a public servant." TEX. PENAL CODE Section 39.02(c)(7) makes this a felony of the first degree if the value of the thing misused is $200,000 or more.

A side by side comparison of Section 39.02(a)(2) and Count I of the indictment reflects that Count I of the indictment does indeed track the language of the statute. The indictment alleges: (1) that Defendant is a public servant; (2) that Defendant had the intent to harm another (and it specifies whom he intended to harm); (3) that Defendant intentionally or knowingly misused government property (and it describes that property with specificity); (4) that the property came into Defendant's custody or possession by virtue of his office as a public servant (and it specifies the office); (5) which portions of the definition of "misuse" it is relying upon (dealing with property contrary to an agreement under which the Defendant held the property; or contrary to the oath of office he took as a public servant.); and (6) the value of the property which identifies the charge as one of a first degree felony ($200,000 or more).

As noted herein, Defendant is not claiming that he does not have sufficient notice of the charges against him that would allow him to prepare his defense. Quite the contrary, Defendant has telegraphed his defense to the charges *as he understands them to be* (i.e., he has vigorously asserted that he has a constitutional unfettered right to exercise his veto power). Defendant has presented in detail what he believes is the factual basis for the State's charge in Count I. Attached as Exhibit 3 to Defendant's Motion to Quash is the "Governor's Veto and Statement,"—The Proclamation filed on June 14, 2013, evidencing his veto of the appropriations

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bill funding the Public Integrity Unit.

Yet, this is precisely what concerns the court about the wording of Count I. Count I does indeed track the statutory language of Section 39.02(a)(2) by alleging that Defendant "misused" government property "by dealing with such property contrary to an agreement under which defendant held such property or contrary to the oath of office he took as a public servant." Under most circumstances, that should be enough, and, as explained herein, it is enough *for now*. However, Count I does not state that Defendant misused the funds in question by exercising his power to veto legislation. Nowhere is the word "veto" used in Count I. It is clear that the Defendant has been operating under the assumption that the veto of the appropriations bill is the alleged "misuse" (which is a reasonable assumption considering how the charge of Coercion of a Public Servant is worded in Count II). However, the indictment seems to leave the following questions unanswered: 1) under what agreement did the Defendant hold the property in question; and, 2) how did the Defendant deal with that property contrary to such agreement; or, 3) how did he deal with such property, that is alleged to have been in his custody or possession, contrary to his oath of office? The problem, therefore, is not what is *in* Count I, the problem is what is *missing*.

Nevertheless, the Defendant (and the court) can only work with the language that is in the indictment. A motion to quash an indictment may be based upon the assertion that it "does not appear [from the indictment] that an offense against the law was committed by the defendant."[9]

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9 TEX. CODE CRIM. PROC. art. 27.08(1). *See, e.g., State v. Watts,* 2007 Tex. App. LEXIS 6455, 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 the public servant's employment, but the law allegedly violated, as pled in the indictment, cannot meet the definition of "law relating to a public servant's office or employment," then the requirements of Section 39.02(a) cannot be met, and such an indictment would appropriately be quashed) (citing *State v. Campbell,* 113 S.W.3d 9, 12 (Tex. App.—Tyler 2000, pet ref'd) ("An indictment which fails to allege criminal conduct is subject to being quashed")). *See, e.g., Delay v. State,* 443 S.W.3d 909, 912-13 (Tex. Crim. App. October 1, 2014) ("But sometimes appellate review of legal sufficiency

That is where the Defendant's arguments are focused. However, Count I does not clearly state that Defendant misused property by vetoing legislation. Therefore, the issue of whether Defendant's veto was in violation of Section 39.02(a)(2) is not before this court. The Defendant's motion to quash, his pretrial writ application, and the Brief of the Amici Curiae[10] all vigorously and repeatedly argue that Defendant's exercise of his power to veto cannot constitute a criminal offense. Defendant, however, has put the cart before the horse. To be entitled to relief in a motion to quash, the Defendant has to first challenge wording in an indictment that is actually in that indictment.

Had the Defendant properly challenged the sufficiency of the indictment, the court could have followed the guidance provided by *State v. Moff,* 154 S.W.3d 599 (Tex. Crim. App. 2004). In *Moff,* the defendant was charged with misapplication of fiduciary property and filed a motion to quash. After the trial court granted the motion to quash, it ordered the State to re-file the indictment with the requested specificity. The State appealed without re-filing the indictment. The Court of Appeals reversed the trial court's decision to quash, and the appellant petitioned for discretionary review. The Court of Criminal Appeals reversed the Court of Appeals' opinion and upheld the trial court's decision to quash the indictment, holding that the defendant was entitled to notice of the specific acts on which the State intended to rely. The Court of Criminal

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involves simply construing the reach of the applicable penal provision in order to decide whether the evidence, even when viewed in the light most favorable to conviction, actually establishes a violation of the law . . . . *If the evidence establishes precisely what the State has alleged, but the acts that the State has alleged do not constitute a criminal offense* under the totality of the circumstances, then that evidence, as a matter of law, cannot support a conviction. We agree with the court of appeals' ultimate conclusion that, as a matter of law, what the State has proven in this case does not constitute either of the alleged criminal offenses.") (emphasis added), citing to *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

10 The brief filed by Counsel for Amici Curiae, which is not relevant to the court's analysis of the motion to quash (because as previously noted, that brief was filed in support of the writ application, not the motion to quash), also discusses anticipated evidence in support of its constitutional arguments, but there is no evidence before the court at this time, and it would be inappropriate for the court to consider such speculative evidence when reviewing a motion to quash.

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Appeals held that a *de novo* review was appropriate under those circumstances; held that the trial court correctly granted the motion to quash; and remanded the case back to the trial court "to resume the proceedings." *Id.* at 604.

Therefore, if the act of vetoing the appropriations bill funding the Public Integrity Unit is the act on which the State intends to rely to show that Defendant misused government property contrary to an agreement or contrary to his oath of office, *Moff* instructs that the indictment should say so. On the other hand, if the veto is not the act of alleged misuse, then the Defendant's pleadings demonstrate that he does not have sufficient notice of what facts support the State's claim of misuse. In either case, Count I of the indictment could be more specific,[11] but no such request has been made. In any event, although urged by Defendant, the issue of whether the Governor's use of his veto power is or is not a criminal offense is not an issue that is before the court given the manner in which Count I is currently alleged.

Simply put, Defendant's motion to quash either raises constitutional "as applied" claims that are not cognizable in a pretrial motion to quash, or it raises claims that Count I is unconstitutional based on language not in Count I. In other words, the assertions that Count I of the indictment does not allege a criminal offense are based on allegations that are presumed, but are not presently contained in Count I. To the extent Defendant's motion to quash raises the vagueness issue at all, it challenges the vagueness of the statutes, not the vagueness of the language in Count I. Since the trial court's authority to resolve issues pretrial is limited by the pleadings filed by the parties,[12] the court has no choice but to deny the Defendant's First Motion

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11 In the words of noted author and educator Stephen Covey, "the main thing is to keep the main thing the main thing."

12 Defendant states on page 2, in footnote 1, of his motion that "Governor Perry recognizes that this 'first' motion is not legally necessary to provide the Court with jurisdiction to quash the indictment." Defendant cites no authority

to Quash Count I.

The Defendant is permitted to file another written motion to quash Count I challenging the sufficiency of the indictment, and the State is permitted (and encouraged) to amend the indictment to plead Count I with more specificity, as suggested herein. However, given the pleadings currently filed by the parties, the only ruling the trial court can make at this time is to DENY the Defendant's First Motion to Quash Count I.

B. <u>The Sufficiency of Count II</u>

Count II of the Indictment alleges as follows:

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

Count II of the indictment alleges a violation of TEX. PENAL CODE Section 36.03(a)(1), Coercion of a Public Servant. Under Section 36.03(a)(1), a person commits an offense if by means of coercion he influences or attempts to influence a public servant in . . . a specific performance of [her] official duty." Section 1.07(a)(9) of the Penal Code defines "coercion" as "a threat, however communicated: . . . (F) to take or withhold action as a public servant, or to cause a public servant to take or withhold action." *See Tobias v. State,* 884 S.W.2d 571, 586

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for this assertion, and the court is unaware of any authority that would allow it to dismiss this indictment on grounds not raised in writing. In fact, the cases cited herein dictate that specific objections must be made to put both the court and State on notice, which is the opposite of what Defendant suggests.

(Tex. App.—Fort Worth, 1994, pet. ref'd) (section 1.07's definition of "coercion" applies to a section 36.03 offense).

TEX. PENAL CODE Section 36.03(c) contains the following exception to criminal liability under this statute:

> 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.

TEX. PENAL CODE Section 2.02(b) mandates that a statutory exception must be negated in the indictment and that it be proven beyond a reasonable doubt that the Defendant's conduct does not fall within the exception (which means the negation of the exception is an element of the offense). *See also Bird v. State,* 937 S.W.2d 136 (Tex. App.—Houston 1st Dist.] 1996, no pet.); *State v. Martinez,* 829 S.W.2d 365, 366 (Tex. App.—Corpus Christi 1992), aff'd 879 S.W.2d 54 (Tex. Crim. App. 1994) (to adequately allege all elements of an offense, the instrument must negate every exception to the offense).

As noted above, an indictment which tracks the language of the penal statute will generally be legally sufficient. As it did with Count I, this court compared the statutory language required to be in the indictment with the wording of Count II of the indictment. The indictment: (1) alleges "by means of coercion" (specifically describing the "coercion" as threatening to veto legislation, which is an act committed by Defendant "while acting in an official capacity as a public servant," unless Rosemary Lehmberg resigned as Travis County District Attorney); and (2) alleges that Defendant intentionally or knowingly influenced or attempted to influence Rosemary Lehmberg, a public servant, in the specific performance of her official duty (describing that duty as continuing to act as District Attorney through the end of her elected

term).

Defendant's ground for relief 8 asserts that Count II is void because it does not properly negate the exception in Section 36.03(c). This court agrees that the statement in the indictment that "the defendant and Rosemary Lehmberg were not members of the same governing body of a governmental entity" did not properly negate the exception under Section 36.03(c). Thus Count II fails to allege an essential element of the offense, and therefore Count II of the indictment is defective for failing to properly negate the exception to the offense.

However, where an exception is not properly negated within the charging instrument, the proper remedy is not dismissal of the charges, but rather amendment of the indictment. According to Texas Code of Criminal Procedure 28.09, "[if an] exception to an indictment or information is sustained, the information or indictment may be amended if permitted by Article 28.10 of this code, and the cause may proceed upon the amended indictment or information." Article 28.10 provides as follows:

> (a) After notice to the defendant, a matter of form or substance in an indictment or information may be amended at any time before the date the trial on the merits commences. On the request of the defendant, the court shall allow the defendant not less than 10 days, or a shorter period if requested by the defendant, to respond to the amended indictment or information.
>
> (b) A matter of form or substance in an indictment or information may also be amended after the trial on the merits commences if the defendant does not object.
>
> (c) An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced.

The case of *Tobias v. State,* 884 S.W.2d 571 (Tex.App.—Fort Worth, 1994, pet. ref'd), *cert. denied* 515 U.S. 1126 (1995), *reh'g denied,* 515 U.S. 1180 (1995) is instructive. In *Tobias,* the defendant asserted that the trial court erroneously allowed the State to amend the indictment,

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when the original indictment did not allege an offense. Defendant filed a motion to quash the indictment on the grounds that it failed to negate the statutory exception to the offense of coercion of a public servant. In response to that motion, the State filed a motion to amend the indictment to include a negation of the statutory exception. Tobias' argument on appeal was two-fold: (1) the original indictment was fatally defective and void because it did not comply with the law concerning negation of statutory exceptions and because the indictment was void, the trial court did not have jurisdiction to permit amendment of the indictment; and (2) the court's action allowing the State to amend the indictment violated Tobias's right not to be prosecuted except on an indictment from a grand jury, citing U.S. CONST. amend. V, and TEX. CONST. art. I, § 14. The court disagreed with Tobias' arguments:

> The negation of an exception to an offense is defined to be an element of that offense. TEX. PENAL CODE ANN. § 1.07(a)(22)(D) (Vernon 1994) (formerly § 1.07(a)(13)(D)); *Labelle v. State,* 692 S.W.2d 102, 105 (Tex. Crim. App. 1985). The failure to allege an element of an offense in an indictment is a defect of substance. *Studer v. State,* 799 S.W.2d 263, 268 (Tex.Crim.App.1990). Article 28.10(a) of the Code of Criminal Procedure provides that, "[a]fter notice to the defendant, a matter of form or substance in an indictment or information may be amended at any time before the date the trial on the merits commences." TEX. CODE CRIM. PROC. ANN. art. 28.10(a) (Vernon 1989).
>
> In 1985, article 1.14 of the Texas Code of Criminal Procedure, and Art. V, sec. 12 of the Texas Constitution were amended. The amendments did not on their face change the long-standing precedent that failure to allege an element of an offense in an indictment is a defect of substance. *Studer,* 799 S.W.2d at 268. Rather, the changes related to the effect of a substantive defect in an indictment. The Court of Criminal Appeals in *Studer* concluded that because article 28.10 clearly allows for the amendment of any matter of form or substance in an indictment, an indictment need not plead each constituent element of an offense to charge a person with the commission of an offense. *Id.* at 271.
>
> Accordingly, article 28.10 provided the method by which the State in the instant case could amend the indictment to include the language pertaining to the negation of the statutory exception to the offense.
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> . . . The other argument contained in Tobias' second point of error is that the amendment charged a new offense, and violated his right not to be prosecuted except on an indictment from a grand jury.

The Code of Criminal Procedure provides: (c) An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced. TEX.CODE CRIM.PROC.ANN. art. 28.10(c) (Vernon 1989).

The Texas Court of Criminal Appeals interpreted this provision in *Flowers v. State,* 815 S.W.2d 724 (Tex.Crim.App.1991), and held that the amendment of an indictment changing an element of the offense does not either charge a different offense or prejudice any substantial rights of the defendant. *Id.* at 728–29. A "different offense" means a *different statutory offense* since, although a change in an element of the offense changes the evidence required to prove an offense, it is still the same offense. *Id.* at 728. Additionally, in determining whether an amendment changing an element affected a substantial right, the court held that in most cases an amendment is permissible where it is made on the basis of the same incident upon which the original indictment is based. *Id.* at 729.

> In the case at bar, both the original and amended indictments were based upon the same incidents, and alleged violations by Tobias of the same Penal Code section. *We find no support in Tobias's claim that the court's action allowing the State to amend the indictment violated Tobias's rights under U.S. CONST. amend. V or TEX. CONST. art. I, § 14.*

(Emphasis added). The appellate court in *Tobias* held that the trial court properly granted the State's motion to amend the indictment.

In this case, the State has argued that the negation of an exception to an offense may be done "implicitly." See *Tarlton v. State*, 93 S.W.3d 168, 173 (Tex.App.—Houston 14th Dist. 2002, pet. ref'd); *citing to Kohler v. State,* 713 S.W.2d 141, 144 (Tex.App.-Corpus Christi 1986, pet. ref'd); *Priego v. State,* 658 S.W.2d 655, 659 (Tex.App.-El Paso 1983, no pet.) (holding that the State's use of the term "parent" in an indictment to describe the defendant's relationship to a child implicitly negated an exception to liability for individuals who relinquished their parental rights or had them terminated by a judicial order). However, the statutory exception under Section 36.03(c) is neither expressly nor implicitly negated by alleging in Count II that "the defendant and Rosemary Lehmberg were not members of the same governing body of a governmental entity."

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Therefore, although the State has not sought to amend Count II of the indictment, the court nevertheless ORDERS as follows: The court DENIES the Defendant's motion to quash Count II (based on ground for relief 8); the court SUSTAINS the Defendant's purported objection to Count II; and the court GRANTS the State leave to amend Count II of the indictment to properly negate the exception under Section 36.03(c). Since the State is permitted to amend Count II to properly negate the exception, Defendant's claims regarding the constitutionality of Count II are premature.

Based upon the specific grounds set forth above, and for the reasons discussed herein, the court DENIES Defendant's First Motion To Quash And Dismiss The Indictment as to both Counts I and II and ORDERS that the State is granted leave to amend Count II of the indictment as specified herein.

SIGNED and ENTERED on January 27, 2015.

JUDGE BERT RICHARDSON
Judge Presiding
By Assignment

I, VELVA L. PRICE, District Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness my hand and seal of office
On _____

VELVA L. PRICE
DISTRICT CLERK
By Deputy: JS

ORDER

The District Clerk of Travis County, Texas, is directed to immediately send copies of this Order to the following persons by certified mail, return receipt requested, or by the most practical means:

a. Attorneys For Defendant:

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206 East 9th Street, Suite 1511
Austin, Texas 78701

SIGNED and ENTERED on January 27, 2015.

Judge Bert Richardson
BERT RICHARDSON
Judge Presiding
By Assignment

I, VELVA L. PRICE, District Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness my hand and seal of office
On _____

VELVA L. PRICE
DISTRICT CLERK
By Deputy: JH

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Filed In The District Court
of Travis County, Texas
on 1-27-2015 HS
at 1:30 P M.
Velva L. Price, District Clerk

NO. D1DC14-100139

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

ORDER DENYING DEFENDANT'S FIRST APPLICATION FOR PRETRIAL WRIT OF HABEAS CORPUS

On August 15, 2014, the Grand Jury for the County of Travis, State of Texas returned an indictment against Defendant James Richard "Rick" Perry. The indictment charges two counts. Count I alleges a violation of TEX. PENAL CODE Section 39.02 Abuse of Official Capacity, and Count II alleges a violation of TEX. PENAL CODE Section 36.03 Coercion of Public Servant. [1]

On August 25, 2014, Defendant, through his counsel of record, filed an Application For Pretrial Writ of Habeas Corpus seeking to bar the prosecution of him on "multiple constitutional grounds."

As more fully discussed herein, well-settled Texas case law does not permit a pretrial "as

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

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

applied" constitutional analysis of a state penal or procedural statute. Therefore, the trial court does not have the authority to decide at this stage of the case whether TEX. PENAL CODE Sections 39.02(a)(2) and 36.03(a)(1) are being unconstitutionally applied to this Defendant. However, the trial court does have the authority to determine whether a statute is unconstitutional on its face. This court finds that TEX. PENAL CODE Sections 39.02(a)(2) and 36.03(a)(1) are not facially unconstitutional. Therefore, this court DENIES Defendant's First Application For Pretrial Writ of Habeas Corpus.[2]

DEFENDANT'S CLAIMS FOR RELIEF

Count I

1. As to Count I, Section 39.02(a)(2) violates the Fifth and Fourteenth Amendments to the Constitution of the United States as applied because its prohibition of "misuse" of "government property ... that has come into the [Governor's] custody or possession" is unconstitutionally vague as a matter of law if extended to a mere gubernatorial veto of any appropriation of State funds.

2. As to Count I, Section 39.02(a)(2) violates Article I, Sections 10 and 19 of the Texas Constitution as applied because its prohibition of "misuse" of "government property ... that has come into the [Governor's] custody or possession" is unconstitutionally vague as

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2 Although not relevant to the issues raised in Defendant's pretrial writ application, the court noted in its order ruling on Defendant's motion to quash, and thus wishes to note here, that Count II appears to allege a Class A misdemeanor, not a third degree felony. TEX. PENAL CODE sec. 36.03(b) states that "an offense under this section is a Class A misdemeanor unless the coercion is a threat to commit a felony, in which event it is a felony of the third degree." The court's reading of Count II as a Class A misdemeanor, and not as a third degree felony, is based upon two things. First, the alleged "threat" is not charged in the indictment as "a threat to commit a felony." The term "felony" is nowhere found in Count II, and if the State believes that it has alleged "coercion" as a threat to commit the felony of abuse of official capacity as charged in Count I, the indictment is not so worded. A defendant is entitled to "notice of the particular offense with which he is charged." TEX. CODE CRIM. PROC. art. 21.11. Second, the last line of Count II includes the phrase, "such offense having been committed by defendant, a public servant, while acting in an official capacity as a public servant." Defendant "acting in an official capacity as a public servant" is not an element of a Section 36.03(a)(1) offense, but it is required to bring the alleged "threat" within the Section 1.07(a)(9)(F) definition of "coercion." Thus, the omission of the wording "threat to commit a felony," coupled with the inclusion of the charge that Defendant was acting in *his* official capacity, leads to the logical conclusion that Count II is being indicted as a threat "to take or withhold action as a public servant" (TEX. PENAL CODE Section 1.07(a)(9)(F)), which is a Class A misdemeanor. Such language also brings the charged offense within the jurisdiction of this court under TEX. CODE CRIM. PROC. art. 4.05 (" . . . [C]riminal district courts shall have original jurisdiction in criminal cases . . . of all misdemeanors involving official misconduct.") In any event, the grade of the offense charged in Count II has never been raised as an issue by Defendant, and thus any confusion regarding the grade of the offense alleged in Count II is not an issue before the court.

a matter of law if extended to a mere gubernatorial veto of any appropriation of State funds.

3. As to Count I, Section 39.02(a)(2) is unconstitutional as applied because it infringes upon the Governor's absolute constitutional right and duty to approve or disapprove "items of appropriation" under Article IV, Section 14 of the Texas Constitution.

4. As to Count I, Section 39.02(a)(2) is unconstitutional as applied because it violates the separation of powers between the various departments of government that is guaranteed to the People by Article II, Section 1 of the Texas Constitution.

5. As to Count I, because a governor acts in a constitutionally prescribed legislative capacity in vetoing legislation, Section 39.02(a)(2) is unconstitutional as applied because it violates the protection afforded by the Speech or Debate Clause of Article III, Section 21 of the Texas Constitution.

6. As to Count I, because the Governor was acting in a legislative capacity in vetoing the appropriation at issue, Count I of the indictment is void because it is necessarily based on evidence privileged by the Speech or Debate Clause of Article III, Section 21 of the Texas Constitution.

7. As to Count I, because the Governor was acting in a legislative capacity in vetoing the appropriation at issue, trial on Count I of the indictment is barred as a matter of law because the State could only sustain its burden, if at all, by introducing evidence privileged by the Speech or Debate Clause of Article III, Section 21 of the Texas Constitution.

8. As to Count I, Section 39.02(a)(2) is unconstitutional as applied because Governor Perry had the right to do any and all acts of which he is charged in the exercise of his rights under the Free Speech guarantee of the First Amendment to the Constitution of the United States.

9. As to Count I, Section 39.02(a)(2) is unconstitutional as applied because Governor Perry had the right to do any and all acts of which he is charged in the exercise of his rights under the Free Speech guarantee of Article I, Section 8 of the Texas Constitution.

Count II

1. As to Count II, Section 36.03(a)(1) violates the First and Fourteenth Amendments to the United States Constitution because, as enacted into law, it is unconstitutionally overbroad on its face.

2. As to Count II, Section 36.03(a)(1) violates Article I, Section 8 of the Texas Constitution because, as enacted into law, it is unconstitutionally overbroad on its face.

3. As to Count II, Section 36.03(a)(1) violates the First and Fourteenth Amendments to the United States Constitution because, as enacted into law, it is unconstitutionally vague on its face.

4. As to Count II, Section 36.03(a)(1) violates Article I, Section 8 of the Texas Constitution because, as enacted into law, it is unconstitutionally vague on its face.

5. As to Count II, Section 36.03(a)(1) violates the First, Fifth, and Fourteenth Amendments to the United States Constitution because it is unconstitutionally vague as applied.

6. As to Count II, Section 36.03(a)(1) violates Article I, Sections 8, 10, and 19 of the Texas Constitution because it is unconstitutionally vague as applied.

7. As to Count II, Section 36.03(a)(1) violates the First, Fifth, and Fourteenth Amendments to the United States Constitution because it is unconstitutionally overbroad as applied.

8. As to Count II, Section 36.03(a)(1) violates Article I, Sections 8, 10, and 19 of the Texas Constitution because it is unconstitutionally overbroad as applied.

9. As to Count II, Section 36.03(a)(1) is unconstitutional as applied because it infringes upon the Governor's absolute constitutional right and duty to approve or disapprove "items of appropriation" under Article IV, Section 14 of the Texas Constitution.

10. As to Count II, Section 36.03(a)(1) is unconstitutional as applied because it violates the separation of powers between the various departments of government that is guaranteed to the People by Article II, Section 1 of the Texas Constitution.

11. As to Count II, Section 36.03(a)(1) is unconstitutional as applied because it violates the Speech or Debate Clause of Article III, Section 21 of the Texas Constitution.

12. Count II of the Indictment is void as a matter of law because, contrary to requisites of Section 2.02(b) of the Penal Code, it makes no attempt to negate the statutory exception set forth in Section 36.03(c) for "a member of the governing body of a governmental entity," which includes Governor Perry's actions as a member of the Legislative Department with regard to his actions in approving or disapproving of "items of appropriation" under Article IV, Section 14 of the Texas Constitution.

Defendant asserts that because Section 39.02(a)(2) and Section 36.03(a)(1) are unconstitutional, either on their face or as applied, or both, the indictment against Governor Perry must be dismissed and the prosecution barred.

The chronology of what has taken place so far in this case was set out in this court's Order Relating to Authority of Attorney Pro Tem. Those facts are not relevant to this writ application, nor are any other widely reported alleged facts related to this case.[3] The issues raised in Defendant's First Application For Pretrial Writ of Habeas Corpus are legal issues, and therefore an evidentiary hearing was not necessary and would not have been appropriate.[4]

THE TRIAL COURT IS WITHOUT AUTHORITY TO REVIEW THE MERITS OF PRETRIAL "AS APPLIED" CHALLENGES TO THE CONSTITUTIONALITY OF TEXAS PENAL CODE SECTIONS 39.02(a)(2) AND 36.03(a)(1)

Whether a claim is even cognizable on pretrial habeas is a threshold issue that should be addressed before the merits of the claim may be resolved. *Ex parte Ellis,* 309 S.W.3d 71, 79 (Tex. Crim. App. 2010). If a non-cognizable claim is resolved on the merits in a pretrial habeas appeal, then the pretrial writ has been misused. *Id.*

Generally, a court's authority to act is limited to those actions authorized by constitution, statute, or common law. *State v. Johnson,* 821 S.W.2d 609, 612 (Tex. Crim. App. 1991). A court

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3 The unique circumstances involved in this case have been widely reported, argued, and discussed by many with no standing in the case, including the amicus briefs and many other self-appointed "experts." The alleged and speculated upon facts are not properly before this court at this time, and the court has no authority at this stage to examine the evidence that was presented to the Grand Jury. Only one amicus brief was properly filed by Counsel for Defendant and is contained in the court's file. The court considered the arguments set forth in that brief, but finds that they do not prevail over well settled cases decided by the Texas Court of Criminal Appeals. The Amici Curiae's brief fails to cite to any controlling Texas authority that would give this court authority to grant the requested relief. That brief does cite cases from other jurisdictions in support of Defendant's assertion that he is immune from prosecution under these facts. *See, e.g., State v. Dankworth*, 672 P.2d 148 (Alaska App. 1983) (holding that a state senator was immune from prosecution under the speech or debate clause of the Alaska Constitution) and *D'Amato v. Superior Court*, 167 Cal. App. 4th 861 (Cal. App. 4th Dist. 2008) (finding that the application of statute violated separation of powers clause, and that legislative immunity extends to criminal prosecutions). However, while the court finds the constitutional arguments raised by Counsel for Amici Curiae to be persuasive, this court must follow controlling *Texas* case law that precludes this court from considering the merits of Defendant's "as applied" constitutional challenges. The other amicus briefs were not properly filed. Many of those briefs were authored by inmates (arguing both in favor and against the State), and at least one was authored by a person held in a prior case to be a "vexatious litigant." Those briefs were not considered by the court.

4 In fact, Texas case law expressly prohibits the court from holding an evidentiary hearing on an "as applied" challenge. *State ex rel. Lykos v. Fine,* 330 S.W.3d 904, 911 (Tex. Crim. App. 2011).

has the power to dismiss a case without the State's consent in certain circumstances, such as when a defendant has been denied a speedy trial (which is not at issue here), or when there is a defect in the charging instrument (which is addressed in this court's order ruling on the Defendant's First Motion To Quash and Dismiss the Indictment). *Id.* Moreover, a claim that a statute is unconstitutional on its face may be raised by a pretrial writ of habeas corpus, and the trial court would have authority to rule on the merits of such a claim. *Ex Parte Weise,* 55 S.W.3d 617, 620 (Tex. Crim. App. 2001), cited in *Ex Parte Thompson,* 414 S.W.3d 872 (Tex. App.—San Antonio 2013, pet. granted). However, a pretrial habeas is not available to test the sufficiency of the charging instrument or to construe the meaning and application of the statute defining the offense charged. *Ex parte Ellis,* 309 S.W.3d at 79.

The Texas Court of Criminal Appeals has made it crystal clear that a trial court has no authority to consider the merits of a pretrial writ of habeas corpus based upon an "as applied" challenge to the constitutionality of a statute. *State ex rel. Lykos v. Fine,* 330 S.W.3d 904, 911 (Tex. Crim. App. 2011) ("An 'as applied' challenge is brought during or after a trial on the merits, for it is only then that the trial judge and reviewing courts have the particular facts and circumstances of the case needed to determine whether the statute or law has been applied in an unconstitutional manner."); *Ex Parte Ellis,* 309 S.W.3d 71, 79 (Tex. Crim. App. 2010) (A pretrial habeas is an "extraordinary remedy," that may not be "misused to secure pretrial appellate review of matters that in actual fact should not be put before appellate courts at the pretrial stage."); *Ex parte Weise,* 55 S.W.3d 617, 620 (Tex. Crim. App. 2001) ("We granted review on our own motion to decide whether a pretrial writ of habeas corpus may issue on the ground that a penal statute is being unconstitutionally applied because of the allegations in the indictment or information. We conclude that it may not.")

The El Paso Court of Appeals in *Ex parte Cross,* 69 S.W.3d 810, 811 (Tex. App.—El Paso, 2002, no pet.), dismissed as not yet ripe for adjudication the defendant's pretrial appeal seeking reversal of the trial court's denial of his application for pretrial writ of habeas corpus. The court noted that "the Court of Criminal Appeals *has consistently cautioned* against most use of pretrial writs to adjudicate 'as applied' constitutional challenges; this also mitigates against the exercise of our discretion. . . . On this record, *we are not prepared to expand Texas jurisprudence* to hold that a pretrial writ of habeas corpus is the appropriate procedural vehicle by which an as applied First Amendment challenge should be adjudicated. This conclusion is particularly reinforced by settled Texas law that an 'as applied,' as opposed to a facial, constitutional challenge can only be preserved by raising that challenge in the trial court. . . . In other words, Texas law contemplates that such challenges can be adjudicated on direct appeal.") (emphasis added, citations omitted).

As in *State ex rel. Lykos v. Fine,* 330 S.W.3d at 919, Defendant in this case "has cited no state law or state procedure that permits a pretrial evidentiary hearing to determine the 'as applied' constitutionality of a state penal law or state criminal procedural statute. . . . He is, in truth, seeking a declaratory judgment." Because there is no basis under Texas law to conduct a pretrial evidentiary hearing to determine the "as applied" constitutionality of a state penal or criminal procedural statute, the trial court does not have legal authority to conduct any such pretrial evidentiary hearing or to issue any such pretrial declaratory judgment. If this court were to hold such a hearing or grant relief on the basis of Defendant's "as applied" constitutional challenges, **it would be acting "beyond the scope of [its] lawful authority."** *Id.* at 919.[5]

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5 *See also, Ex parte Howard,* 191 S.W.3d 201, 203 (Tex. App – San Antonio 2005, no pet.)("A pretrial writ of habeas corpus … may not be used to address an 'as applied' challenge to a statute. 'As applied' challenges must be litigated in the trial court and adjudicated on direct appeal.")(citing to *Ex parte Woodall,* 154 S.W.3d 698, 700–01

To paraphrase, Count I of the indictment alleges that Defendant, with intent to harm Rosemary Lehmberg and the Public Integrity Unit, intentionally or knowingly misused government property of which Defendant, as Governor of the State, had custody or possession (the property being described as "monies having a value in excess of $200,000" which were to be used to fund the continued operation of the Public Integrity Unit) "by dealing with such property contrary to an agreement under which defendant held such property or contrary to the oath of office he took as a public servant."

Summarizing Defendant's arguments presented in his writ application, he seeks to dismiss Count I on the ground that he, as the Governor of the State of Texas, had the constitutional right to exercise his power to veto legislation approving the funding for the continued operation of the Public Integrity Unit, and therefore *as a matter of constitutional law,* such conduct alleged in Count I of the indictment could not be considered a criminal misuse of such funds under Section 39.02(a)(2). The trial court is without authority at this pretrial stage of the case to consider and rule upon the merits of this particular defense because it is clearly (and is expressly stated by Defendant to be) a challenge to the constitutionality of Section

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(Tex. App.--El Paso 2004, pet. ref'd) (recognizing argument alleging that a city ordinance is unconstitutional because it is an *ex post facto* law is "an 'as applied' challenge to the constitutionality of the ... ordinance."); *Ex parte Ragston,* 402 S.W.3d 472, 476 (Tex. App. –Houston [14th Dist.] 2013), aff'd on other grounds, 424 S.W.3d 49 (Tex. Crim. App. 2014) ("A pretrial writ of habeas corpus may not be used to address an as-applied constitutional challenge to a statute. An as-applied challenge is brought during or after a trial on the merits, because it is only then that the trial judge and reviewing courts have the particular facts and circumstances of the case needed to determine whether the statute or law has been applied in an unconstitutional manner. Even if an appellant calls his claim a facial challenge, if it is in fact an as-applied challenge, courts should refuse to consider the merits of the claim.") (citations omitted); *Barker v. State,* 335 S.W.3d 731, 734 (Tex. App. – Houston [14th Dist.] 2011, pet. ref'd) ("The constitutionality of a statute 'as applied' to a defendant cannot be raised in a pretrial motion because resolution of such issue depends upon the facts of the case—facts that can be found only after all the evidence is presented at trial.")

39.02(a)(2) as that statute is being "applied" to *this* Defendant under *this* set of facts.[6] Therefore, pursuant to the controlling case law cited herein, this court is without the authority to entertain Defendant's "as applied" claims for relief as to Count I.

Defendant also raises "as applied" challenges as to Count II. Defendant asserts that he, as the Governor of the State of Texas, had the right *as a matter of constitutional law* under the Speech or Debate Clause to make the alleged threat to veto legislation approving the funding for the continued operation of the Public Integrity Unit in an attempt to effectuate the resignation of Travis County District Attorney Rosemary Lehmberg, and, under the Separation of Powers clause, the Judicial branch of government (this criminal court) cannot infringe upon such right *as a matter of constitutional law*.[7] Again, however, this court is without the authority to entertain pretrial such an "as applied" constitutional challenge with regard to Count II.

Although *State v. Hanson*, 793 S.W.2d 270 (Tex. App.—Waco 1990, no pet.), arguably supports the court's ability to conduct an "as applied" analysis here, there was no petition for discretionary review filed in *Hanson*, and every case decided by the Texas Court of Criminal Appeals since *Hanson* has held that an "as applied" challenge to the constitutionality of a statute is not permitted at the pretrial stage. Thus, *Hanson* is not controlling.

The issues presented in this particular case are unique, and Defendant's arguments are compelling and may be relevant at a later time, but not during the pretrial process. As the Court stated in *State ex rel. Lykos v. Fine,* "these are all very important issues and they certainly

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6 The court has discussed at length in its order denying Defendant's motion to quash the fact that Count I does not expressly allege that Defendant misused government property by exercising his veto power; however, the wording of the indictment is not at issue here.

7 Defendant also intends to claim a "public duty" justification under Texas Penal Code 9.21 (*See Application for Pretrial Writ of Habeas Corpus, page 31 n. 12*).

deserve careful consideration in an appropriate forum." 330 S.W.3d at 911. However, the current state of the law in Texas is that the trial court is not "the appropriate forum" to decide pretrial whether Texas Penal Code Sections 39.02(a)(2) and 36.03(a)(1) are being unconstitutionally applied to this Defendant, and this court knows of no exception allowing such pretrial "as applied" challenges involving this unique and particular set of circumstances. **Simply put, the court's hands are tied.**

Therefore, for the reasons noted above, Defendant's claims for relief 1 through 9 as to Count I, and claims for relief 5 through 11 as to Count II are DENIED.

THIS COURT DOES HAVE THE AUTHORITY TO RULE ON AN APPLICATION FOR PRETRIAL WRIT OF HABEAS CORPUS BASED UPON A FACIAL CHALLENGE TO THE CONSTITUTIONALITY OF A STATUTE

I. Section 39.02(a)(2) is Not Unconstitutional On Its Face

Pretrial habeas can be used to bring a facial challenge to the constitutionality of the statute that defines the offense but, as noted above, it may not be used to advance an "as applied" challenge. *Ex parte Ellis,* 309 S.W.3d 71, 79 (Tex. Crim. App. 2010). Although not expressly listed among the enumerated claims for relief, Defendant summarily asserts that Section 39.02(a)(2) is unconstitutional on its face. However, such an assertion is not, by itself, enough. *Id.* If a claim designated as a facial challenge is in fact an "as applied" challenge, this court should refuse to consider the merits of the claim. *Id.*

Although this court finds that Defendant's claims regarding Section 39.02(a)(2) are "as applied" challenges, not facial challenges, this court nevertheless finds that Section 39.02(a)(2) is not facially unconstitutional. *See Margraves v. State,* 34 S.W.3d 912, 921 (Tex. Crim. App. 2000) (overruled on other grounds by *Laster v. State,* 275 S.W.3d 512 (Tex. Crim. App. 2009) (Although construing a former version of Section 39.02, the court noted that the statute was not

unconstitutionally vague: "The statute requires that a public servant use government property only in ways that are authorized.") Therefore, to the extent that Defendant is claiming that Section 39.02(a)(2) is facially unconstitutional, that claim for relief is DENIED.

II. Section 36.03(a)(1) is Not Unconstitutional On Its Face

Claims for relief 1 through 4 as to Count II assert that TEX. PENAL CODE Section 36.03(a)(1) is unconstitutional on its face.[8] Specifically, Defendant claims that Section 36.03(a)(1) violates the First and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Texas Constitution, because, as enacted into law, it is unconstitutionally vague and overbroad on its face.

In a facial challenge to a statute's constitutionality, the court "must examine the statute as it is written, rather than how it is applied in a particular case." *State v. Rosseau,* 396 S.W.3d 550, 557 *n. 9* (Tex. Crim. App. 2013), citing to *State ex rel. Lykos v. Fine,* 330 S.W.3d 904, 908 (Tex. Crim. App. 2011). Facial challenges to a statute are difficult to mount successfully. *See Ex parte Morales,* 416 S.W.3d 546, 548 (Tex. App. –Houston [14th Dist.] 2013, pet. ref'd), citing to *Santikos v. State,* 836 S.W.2d 631, 633 (Tex. Crim. App. 1992).

In *Ex parte Lo*, 424 S.W.3d 10, 14-18 (Tex. Crim. App. 2013), the Court of Criminal Appeals set out the standard of review when the constitutionality of a statute, which is a question of law, is being attacked:

> When the constitutionality of a statute is attacked, we usually begin with the presumption that the statute is valid and that the legislature has not acted unreasonably or arbitrarily. The burden normally rests upon the person challenging the statute to establish its unconstitutionality. However, when the government seeks to restrict and punish speech based on its content, the usual presumption of constitutionality is reversed. Content-based regulations (those

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8 Section 36.03, Coercion of a Public Servant, states, in pertinent part, that "(a) a person commits an offense if by means of coercion he: (1) influences or attempts to influence a public servant in a specific exercise of his official power or a specific performance of his official duty."

laws that distinguish favored from disfavored speech based on the ideas expressed) are presumptively invalid, and the government bears the burden to rebut that presumption. The Supreme Court applies the "most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."

To satisfy strict scrutiny, a law that regulates speech must be (1) necessary to serve a (2) compelling state interest and (3) narrowly drawn. A law is narrowly drawn if it employs the least restrictive means to achieve its goal and if there is a close nexus between the government's compelling interest and the restriction. If a less restrictive means of meeting the compelling interest could be at least as effective in achieving the legitimate purpose that the statute was enacted to serve, then the law in question does not satisfy strict scrutiny. Furthermore, when the content of speech is the crime, scrutiny is strict because, "as a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

* * *

> ... According to the First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a "substantial" amount of protected speech "judged in relation to the statute's plainly legitimate sweep." The State may not justify restrictions on constitutionally *protected* speech on the basis that such restrictions are necessary to effectively suppress constitutionally *unprotected* speech, such as obscenity, child pornography, or the solicitation of minors. "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." This rule reflects the judgment that "[t]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted[.]"

Because Defendant is asserting that Section 36.03(a)(1) violates his First Amendment rights to free speech, in an abundance of caution, the court will construe the issue of its facial constitutionality under the presumption of invalidity set forth above in *Ex parte Lo*.

A. <u>Section 36.03(a)(1) is Not Unconstitutionally Overbroad</u>

A statute is impermissibly overbroad if, in addition to proscribing activities that may be constitutionally prohibited, it sweeps within its coverage speech or conduct protected by the First Amendment. *Bynum v. State,* 767 S.W.2d 769, 772 (Tex. Crim. App. 1989); *Roberts v. State,* 278 S.W.3d 778, 790 (Tex. App.—San Antonio 2008, pet. ref'd). To vindicate First Amendment

interests and prevent a chilling effect on the exercise of First Amendment freedoms, the overbreadth doctrine allows a statute to be invalidated on its face even if it has legitimate applications. *Ex parte Ellis,* 309 S.W.3d at 90-91. However, the overbreadth doctrine is "strong medicine" that should be employed "sparingly" and "only as a last resort." *Id.* The court is to determine whether "the statute reaches a substantial amount of constitutionally protected conduct" and whether a "substantial number of the statute's applications are unconstitutional judged in relation to the statute's plainly legitimate sweep." *Ex parte Thompson,* 414 S.W.3d 872 (Tex. App.—San Antonio, 2013 pet. granted).

Defendant challenges Section 36.03, claiming that, on its face, it unconstitutionally regulates free speech. Assuming that coercion[9] can even be considered constitutionally protected speech,[10] this court finds that Section 36.03, on its face, does not unconstitutionally infringe on *protected* free speech. Therefore, even if this court's analysis does not begin with the presumption of validity (giving great latitude to Defendant's argument that Section 36.03 regulates free speech), this court concludes that Section 36.03(a)(1) satisfies strict scrutiny, and any presumption of invalidity has been sufficiently rebutted.

First, this court believes that Section 36.03(a)(1) serves a compelling state interest. Although the issue involved in *Tobias v. State,* 884 S.W.2d 571, 580-81 (Tex. App.—Fort Worth, 1994, pet. ref'd), *cert. denied* 515 U.S. 1126 (1995), *reh'g denied,* 515 U.S. 1180 (1995),

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9 "Coercion" is defined in Texas Penal Code Section 1.07(9) as a "threat, however communicated: (A) to commit an offense; (B) to inflict bodily injury in the future on the person threatened or another; (C) to accuse a person of any offense; (D) to expose a person to hatred, contempt, or ridicule; (E) to harm the credit or business repute of any person; or (F) to take or withhold action as a public servant, or to cause a public servant to take or withhold action."

10 In *Tobias v. State,* 884 S.W.2d 571, 580-81 (Tex. App. – Fort Worth, 1994, pet. ref'd), *cert. denied* 515 U.S. 112 (1995), *reh'g denied,* 515 U.S. 1180 (1995), the court discussed five United States Supreme Court cases wherein certain statements that could possibly be construed as threatening were ultimately constitutionally protected under the specific facts of those cases.

was not a facial challenge to the constitutionality of Section 36.03, the following discussion by the court is helpful:

> . . .While the courts have not yet had an opportunity to rule upon a First Amendment challenge to Penal Code section 36.03, **related statutes prohibiting various types of threats have withstood First Amendment challenges.** *See Collection Consultants, Inc. v. State,* 556 S.W.2d 787, 793–94 (Tex.Crim.App.1977) (op. on reh'g), *appeal dism'd,* 436 U.S. 901, 98 S.Ct. 2228, 56 L.Ed.2d 399 (1978) (telephone harassment statute does not violate defendant's free speech rights); *Puckett v. State,* 801 S.W.2d 188, 192–93 (Tex.App.—Houston [14th Dist.] 1990, pet. ref'd), *cert. denied,* 502 U.S. 990, 112 S.Ct. 606, 116 L.Ed.2d 629 (1991) (retaliation statute prohibiting threats of unlawful action against a person on account of person's actions as a public servant, does not violate defendant's free speech rights).
>
> ... In *Puckett,* the court stated that "[t]he State of Texas undoubtedly has a valid and substantial interest in protecting the integrity of its judicial system and in allowing public servants, witnesses and prospective witnesses to perform their respective duties without interference from threats of physical violence." *Puckett,* 801 S.W.2d at 192. We find the same reasoning applies in the instant case. The State has a valid and substantial interest in protecting the integrity of the judicial system and in allowing its appellate justices to perform their respective duties without interference from threats of physical violence.

(Emphasis added).

Second, this court believes that the statute is narrowly drawn because it employs the least restrictive means to achieve its goal, and there is a close nexus between the compelling interest and the restriction. For example, as the court noted in *Phillips v State,* 401 S.W.3d 282, 290 (Tex. App. – San Antonio 2013, pet. ref'd), "[t]he structure of section 36.03's statutory language shows the proscribed conduct is 'influencing or attempting to influence' and the means of influence is 'by coercion;' subsections (a)(1) and (a)(2) provide two alternate methods of committing the offense by influencing or attempting to influence either a public servant or a voter. TEX. PENAL CODE ANN. § 36.06(a)(1), (2). . . . In addition, the Penal Code's definition of 'coercion' states that 'coercion' is a threat, and lists six different types of threats."

Defendant contends that "Section 36.03(a)(1) criminalizes a substantial amount of constitutionally protected speech, including the veto 'threat' purportedly made by Governor Perry." (*Application for Pretrial Habeas Corpus, page 21).* Threats that amount to extortion are not constitutionally protected. *See Sanchez v. State,* 995 S.W.2d 677, 687-88 (Tex. Crim. App. 1999). *See also Roberts v. State,* 278 S.W.3d 778, 790-91 (Tex. App.—San Antonio 2008, pet. ref'd) ("Section 31.01 provides that consent is not effective if it is induced by deception or coercion. The offense proscribed in the instant case is in many ways similar to bribery or extortion. Bribery and extortion, while involving 'speech,' are not protected by the First Amendment. Threats and bribes are not protected simply because they are written or spoken; extortion is a crime although it is verbal. Accordingly, the type of speech prohibited by section 31.03 is not within the nature of speech protected by the First Amendment; therefore, the statute is not unconstitutionally overbroad.") (citations omitted). This court concludes that Section 36.03(a)(1)'s language limits the application of the statute to criminal behavior and does not render it overbroad to substantially include innocent behavior.

Defendant also asserts that "the literal words of the statute would routinely subject legislators to criminal exposure merely for engaging in their essential legislative functions." The court disagrees. It seems clear that the Section 36.03(c)[11] exception was added to the statute to allow for just that. Therefore, this court finds that Section 36.03(a)(1) is not unconstitutionally overbroad.

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11 Section 36.03(c) states that "[i]t 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."

B. <u>Section 36.03(a)(1) is Not Unconstitutionally Vague</u>

Defendant argues that his vagueness challenges involve First Amendment considerations, which means that a criminal law may be held facially invalid even if the law has some valid application. *Ex parte Ellis,* 309 S.W.3d at 90. When a statute is challenged as unconstitutionally vague, the concern is premised on notions of notice and due process. *Cain v. State,* 855 S.W.2d 714, 717 (Tex. Crim. App. 1993) ("Essentially, as a society we want people to know what conduct is prohibited before we enforce the laws which prohibit their conduct. A statute may be unconstitutionally vague, both in the sense that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, and because it encourages arbitrary and erratic arrests and convictions.")

It is well established that criminal laws must be sufficiently clear in at least three respects. First, a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited. Second, the law must establish determinate guidelines for law enforcement. Finally, where First Amendment freedoms are implicated, the law must be sufficiently definite to avoid chilling protected expression. *Long v. State,* 931 S.W.2d 285, 287 (Tex. Crim. App. 1996) (When a statute is capable of reaching First Amendment freedoms, the doctrine of vagueness demands a greater degree of specificity than in other contexts. Greater specificity is required to preserve adequately the right of free expression because uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.)

Criminal laws must fairly warn individuals of what activity is forbidden. *Ex parte Morales-Ryan,* 2008 WL 2355712 (Tex. App. – San Antonio 2008, pet ref'd), *citing Cotton v. State,* 686 S.W.2d 140, 141 (Tex. Crim. App. 1985) ("A statute which forbids or requires the

doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.") The court must make two inquiries to determine if a statute is vague: (1) Can people of ordinary intelligence ascertain what activity is forbidden by the statute? (2) Does the statute encourage arbitrary arrests or prosecution? *Id.* With regard to Section 36.03(a)(1), this court finds that the answer to number (1) is "yes" and the answer to number (2) is "no." Section 36.03(a)(1) satisfies both hurdles to overcome a vagueness challenge.

This court finds that people of ordinary intelligence can ascertain that attempting to coerce or influence a public servant by making threats is forbidden. In addition, there is no support for the conclusion that the statute encourages arbitrary arrests or prosecution. As noted herein, the term "coercion" is clearly defined by statute as including certain types of "threats."

In *Olivas v. State,* 203 S.W.3d 341, 345-46 (Tex. Crim. App. 2006), the Court examined the ordinary meaning of "threaten" as that term is used in the Penal Code theft statute. Although not directly on point with the issues presented here, the following analysis is relevant:

> When determining a statute's meaning, a court must first attempt to interpret the statute based on the plain meaning of the words used. The word "threaten" is not statutorily defined in the Penal Code, so we turn to the common, ordinary meaning of that word. Webster's Dictionary defines "threaten" in the following manners:
>
> 1. to declare an intention of hurting or punishing; to make threats against;
>
> 2. to be a menacing indication of (something dangerous, evil, etc.); as the clouds *threaten* rain or a storm;
>
> 3. to express intention to inflict (injury, retaliation, etc.);
>
> 4. to be a source of danger, harm, etc. to.
>
> ... Black's Law Dictionary defines "threat" as: "A communicated intent to inflict harm or loss on another or on another's property...."

As the term "threat" is read in the context of the Penal Code's definition of "coercion," this court finds that the offense of coercion of a public servant under Section 36.03(a)(1) is not unconstitutionally vague. *See also Roberts v. State,* 278 S.W.3d 778, 790-91 (Tex. App.—San Antonio 2008, pet. ref'd) ("In this case, coercion is statutorily defined. . . . Read in context, the statute is not so indefinite that people of common understanding would be required to guess at its understanding or that would lead to arbitrary and erratic arrests and convictions. . . . To require further definition of the term 'coerce' would reach the point of defining definitions.").

In *Tobias v. State,* 884 S.W.2d 571 (Tex. App.—Fort Worth, 1994, pet. ref'd), *cert. denied* 515 U.S. 1126 (1995), *reh'g denied,* 515 U.S. 1180 (1995), the court held that Section 36.03 is "narrowly drawn by limiting its scope to threats of a public official in an attempt to influence the exercise of the official's power." *Tobias* concluded that Section 36.03 "is much more akin" to the federal retaliation statute upheld by the Seventh Circuit in *United States v. Velasquez,* 772 F.2d 1348, 1356–58 (7th Cir.1985), *cert. denied,* 475 U.S. 1021, 106 S.Ct. 1211, 89 L.Ed.2d 323 (1986), wherein the court held that "[a] threat to break a person's knees or pulverize his automobile as punishment for his having given information to the government is a statement of intention rather than an idea or opinion and is not part of the marketplace of ideas." *Id.* at 1357. *Tobias* held that "Penal Code section 36.03 is not unconstitutionally vague and overbroad."

Defendant also asserts that *State v. Hanson*, 793 S.W.2d 270, 273 (Tex. App.—Waco 1990, no pet.) supports his claim that Section 36.03(a)(1) is facially unconstitutional. *Hanson* does not apply to the court's analysis of the facial constitutionality of Section 36.03. The court

first notes that *Hanson* involved a motion to quash, not a pretrial writ of habeas corpus.[12] Second, the court in *Hanson* expressly stated that "the penal provisions were unconstitutionally vague when *applied* to Judge Hanson's alleged conduct, [thus] the question of their facial vagueness will not be addressed." (emphasis added). Moreover, Section 36.03 was amended after *Hanson* to include the 36.03(c) exception, which appears to address "robust debate" in the "arena" of "politics" that was at issue in *Hanson*. *See id.* at 273 (Referencing the 36.03(c) exception, the court noted that "[a]n unconstitutional statute can be amended to thereafter make it constitutional.")

Therefore, for the reasons stated herein, this court concludes that Section 36.03(a)(1) is not unconstitutional on its face. Claims for relief 1 through 4 as to Count II are DENIED.

III. Defendant's Claim For Relief Number Twelve Under Count II

Defendant claims that Count II of the Indictment is void as a matter of law because it does not properly negate the exception under Section 36.03(c). As noted above, Section 36.03(c) contains language excepting criminal liability under the statute for members of a governing body acting in their official capacity. This is a challenge to the sufficiency of Count II, and a pretrial habeas is not available to test the sufficiency of the charging instrument. *Ex parte Ellis,* 309 S.W.3d at 79. This is a claim that has been addressed in the court's Order Denying Defendant's First Motion to Quash and Dismiss the Indictment. Therefore, Defendant's claim for relief 12 is DENIED.

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12 *Hanson* is discussed in greater detail in this court's order denying Defendant's motion to quash.

For the reasons discussed herein, the court DENIES Defendant's First Application for Pretrial Writ of Habeas Corpus.

SIGNED and ENTERED on January 27, 2015.

Judge Bert Richardson

BERT RICHARDSON
Judge Presiding
By Assignment

I, VELVA L. PRICE, District Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness my hand and seal of office
On _____

VELVA L. PRICE
DISTRICT CLERK
By Deputy: JS

ORDER

The District Clerk of Travis County, Texas, is directed to immediately send copies of this Order to the following persons by certified mail, return receipt requested, or by the most practical means:

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SIGNED and ENTERED on January 27, 2015.

Judge Bert Richardson
BERT RICHARDSON
Judge Presiding
By Assignment

I, VELVA L. PRICE, District Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness my hand and seal of office
On _____

VELVA L. PRICE
DISTRICT CLERK
By Deputy: JS

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Filed In The District Court
of Travis County, Texas
on 1-27-2015 HS
at 1:30 P M.
Velva L. Price, District Clerk