

THE STATE OF TEXAS, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 DANIEL PERRY, )  
 )  
 Defendant. )  
 )  
 )

IN THE 147TH JUDICIAL  
DISTRICT COURT  
TRAVIS COUNTY, TEXAS

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**REQUEST FOR EVIDENTIARY HEARING IN SUPPORT OF A MOTION  
TO DISMISS INDICTMENT BASED UPON PROSECUTORIAL  
MISCONDUCT**

Defendant, Daniel Perry, hereby moves this Court to set an evidentiary hearing in this case to determine if the indictment filed in the case should be dismissed for prosecutorial misconduct.

**I**

Sgt. Perry is, of course, aware that, under established case law, a prosecutor determined to obtain an indictment has no constitutional or statutory obligation to present a grand jury with exculpatory evidence.<sup>1</sup> Still, “[j]ustice...would best be served by a prosecutor affirmatively presenting a grand jury with any information which could affect its decision to return an indictment.” *State v. Sandoval*, 842

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<sup>1</sup>*United States v. Williams*, 504 U.S. 36 (1992); *In re Grand Jury Proceedings*, 129 S.W.3d 140, 143–44 (Tex. App.-San Antonio 2003 )

S.W.2d 782, 789 (Tex.App.-Corpus Christi 1992). Indeed, there is a legal code, if not a moral code, that must guide prosecutors:

It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done. They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused.

Tex. Code Crim. P. Art. 2.01. *See also Berger v. United States*, 295 U.S. 78, 88 (1935) (“[A prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”)

## II

This motion is necessary because there is a significant difference between simply not presenting exculpatory evidence and affirmatively directing a witness to withhold exculpatory evidence. In fact, it is a felony criminal offense for any person, including an elected district attorney, to “coerce[] a witness or a prospective witness in an official proceeding to withhold any testimony, information, document, or thing...” Tex. Penal Code Art. 36.05.

It has come to the attention of the defense from two independent sources that, on or about May 25, 2021, and May 27, 2021, the lead detective in this case, David

Fugitt, was specifically instructed not to tell grand jurors that the State was in possession of evidence that would indicate that witnesses who claimed that the deceased, Garrett Foster, did not begin to raise his AK-47 assault rifle toward Sgt. Perry were not in a position to see Foster at the time of the incident and that any testimony they might provide would be false and perjurious. The detective was likewise instructed to amend demonstrative evidence that was to be presented to the grand jury (cutting the presentation by more than **sixty percent**) to remove exculpatory evidence *after* the demonstrative aid was presented to prosecutors for review.

In fact, a Texas Open Records Act request was made by a concerned citizen for the May 25, 2021, and May 27, 2021 emails containing these directives, however, the City of Austin has refused to release the emails and, instead, have sought an opinion from the Texas Attorney General regarding its duties to disclose. *See Attachments A and B.*

### **III**

The actions of the District Attorney's Office is particularly egregious in this case given the steps taken by the elected District Attorney, Jose Garza, to mislead the public into believing that his office had, in fact, presented the "most accurate possible

set of facts to the grand jury” when he knew that not to be true.<sup>2</sup>

Garza also claimed that he presented an “overwhelming majority” of the information contained in the “packet” that Undersigned Counsel requested be presented to the grand jury on Sgt. Perry’s behalf. In fact, that is demonstrably false. The defense packet was 7 pages long, and contained 136 sentences and 1,753 words. By email, the District Attorney’s Office informed Undersigned Counsel that it would only present to the grand jury a small non-substantive section of the “packet,” which contained approximately 11 sentences and 157 words (*i.e.*, approximately 8 % of the packet- hardly an “overwhelming majority”). *See* Attachment C.<sup>3</sup> Garza even went on to tell the public that the grand jury met for “three weeks,” neglecting to mention that the grand jury only met on Tuesdays and Thursdays.<sup>4</sup>

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<sup>2</sup>These statements were made in a press conference made by Garza announcing Sgt. Perry’s indictment which can be found at <https://www.youtube.com/watch?v=eX9dBmbjPoM>.

<sup>3</sup>The District Attorney’s Office originally informed Undersigned Counsel orally that it would not present *any* portions of the “packet.” Undersigned Counsel offered to remove the portion discussing Sgt. Perry’s polygraph results (despite the fact that Undersigned Counsel had never before been denied the opportunity in the past to present polygraph results to a grand jury establishing a client’s innocence). *See* Attachment D. It was then that the District Attorney informed Undersigned Counsel that it would allow the very small non-substantive portion of the “packet” to be presented. *See* Attachment C.

<sup>4</sup>At the same press conference, Garza publicly commented on Sgt. Perry’s decision to exercise his Fifth Amendment rights not to testify at a grand jury in which he would not have been represented by counsel. This is a clear violation of the Texas Rules of Professional Conduct. *See* Texas Disciplinary Rules of Professional Conduct 7.02(b)(2) (Violation to make public comment on a suspect’s or defendant’s “refusal or failure to make a statement.”).

Garza also violated State of Texas grand jury secrecy laws by disclosing the number of exhibits presented to the grand jury for which he could be held in contempt of court. *See* Tex.

Indeed, as acknowledged above, Garza had no legal obligation to present exculpatory evidence to the grand jury before endangering Sgt. Perry's career. Likewise, he had no legal obligation to present the defense "packet" to the grand jury in his zeal to get an indictment. Nevertheless, that is a far cry from affirmatively preventing the presentation of exculpatory evidence that the lead detective in this case had intended to present to the grand jury and then misleading the public regarding the one-sided nature of the grand jury presentation made by the District Attorney's Office.

#### IV

The Texas Court of Criminal Appeals has allowed trial court's discretion to dismiss cases with prejudice in cases involving egregious prosecutorial misconduct. *State v. Frye*, 897 S.W.2d 324, 331 (Tex. Crim. App. 1995). That very well may become the necessary remedy in this case.<sup>5</sup>

Still, Sgt. Perry realizes that this is a drastic remedy and additional evidence needs to be developed. Consequently, Sgt. Perry asks that this Court set an evidentiary hearing to take testimony from Detective David Fugitt and District

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Code Crim. P. Art. 20A.204(d).

<sup>5</sup>In addition, a Court of Inquiry may be necessary to determine if a violation of Tex. Penal Code Art. 36.05 occurred. *See generally* Tex. Code. Crim. P. Art. 52.01 (Providing for a Court of Inquiry where there is probable cause to believe "an offense has been committed against the laws of this state.").

Attorney Jose Garza<sup>6</sup> and any other relevant witness. In addition, prior to the hearing, Sgt. Perry requests the Court to order the production of (1) any emails between the Office of the District Attorney and members of the Austin Police Department regarding the grand jury presentation in this case and (2) any PowerPoint type presentations, whether prepared *and not* presented to the grand jury or prepared *and* presented to the grand jury so the two could be compared, by Detective Fugitt.<sup>7</sup>

Respectfully submitted,

/s/ F. Clinton Broden  
F. Clinton Broden  
TX. Bar No. 24001495  
Broden & Mickelsen  
2600 State Street  
Dallas, Texas 75204  
214-720-9552  
214-720-9594 (facsimile)  
clint@texascrimlaw.com

Attorney for Defendant  
Daniel Perry

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<sup>6</sup>Undersigned Counsel fully understands the seriousness of the allegations raised herein. Therefore, he wishes to make clear that they are not directed at Assistant District Attorney Guillermo Gonzalez. It appears that the actions detailed in this motion were always undertaken at the direction of the elected District Attorney Jose Garza as evidenced by Garza's repeated false statements at the July 1, 2021 press conference.

<sup>7</sup>In light of Garza's handling of the grand jury, Sgt. Perry is particularly concerned that the State will not disclose for discovery all exculpatory evidence including, but not limited to, the original demonstrative aid prepared by Detective Fugitt.

**CERTIFICATE OF SERVICE**

I, F. Clinton Broden, certify that on July 7, 2021, I caused the foregoing document to be served by electronic filing on:

Travis County District Attorney's Office  
Ronald Earle Building  
416 West 11th St.  
Austin, TX 78701

/s/ F. Clinton Broden  
F. Clinton Broden

# **ATTACHMENT A**



City of Austin

# Law Department

City Hall, 301 West 2nd Street, P.O. Box 1088  
Austin, Texas 78767-8828  
(512) 974-2268

Writer's Direct Line  
(512) 974-2509

Writer's Fax Line  
(512) 974-2312

June 29, 2021

**VIA FIRST CLASS MAIL**

Honorable Ken Paxton  
Attorney General of Texas  
Open Records Division  
MC-014  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Open Records Request received from Ashley on June 15, 2021.  
(R060448)

Dear Attorney General Paxton,

The Austin Police Department ("the department") received a request for information from Ms. Ashley on June 15, 2021. The City of Austin's administrative offices, including those of the department, were closed on June 18, 2021, in observance of the Juneteenth Holiday. Thus, today is the ninth business day since the department's receipt of Ms. Ashley's request for purposes of timely filing a request for decision under section 552.301 of the Government Code. The department believes the responsive information is excepted from disclosure under section 552.108 of the Government Code. This letter is a request for a determination under section 552.301 of the Government Code that the requested information is so excepted. Copies of the request and the information at issue are enclosed.

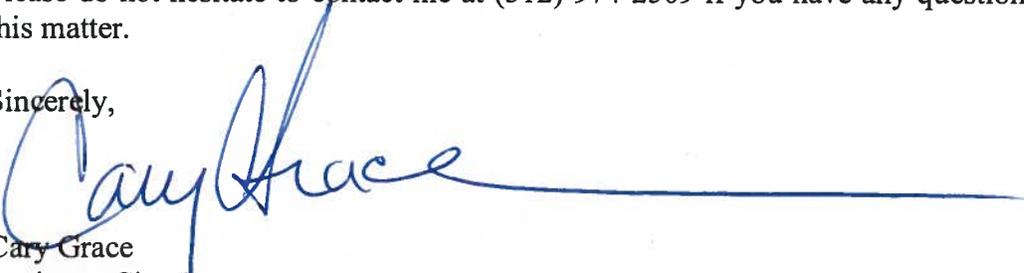
By copy of this letter the department is notifying the requestor that the department wishes to withhold the requested information and has asked for a decision from the Attorney General as to whether this information is within an exception to public disclosure.

The requestor is seeking emails between department Detective David Fugitt and specific individuals in the Travis County District Attorney's Office between May 25, 2021, and May 27, 2021. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. See Gov't. Code §§ 552.108(a)(1), 552.108(b)(1), and 552.301(e)(1)(a); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

The requested information pertains to ongoing criminal case that was very recently presented to a Travis County grand jury. As the lead detective in the criminal investigation, Det. Fugitt was involved in that proceeding. Det. Fugitt has advised that release of the requested information would interfere with this ongoing criminal matter. Accordingly, it is the department's position that the release of information pertaining to this investigation would interfere with the detection, investigation, or prosecution of crime, and the department seeks to withhold the responsive information under section 552.108(a)(1).

Please do not hesitate to contact me at (512) 974-2509 if you have any questions concerning this matter.

Sincerely,



Cary Grace  
Assistant City Attorney

aws/  
Enclosures

cc: (without enclosures)  
Ms. Ashley  
Via email: [ashley@dougoconnell.com](mailto:ashley@dougoconnell.com)

# **ATTACHMENT B**

**Describe the Record(s) Requested:**

Hello, I would like to do an open records request for any and all emails between APD Detective David Fugitt, Guillermo Gonzalez, and or Efrain De La Fuente on 5/25/21 through 5/27/21. Thank you.

Respectfully,  
Ashley Haisler  
Paralegal

signature\_91739269  
505 West 12th Street - Suite 200  
Austin, TX, 78701 | 512.547.7265 | [Website](#) | [LinkedIn](#) | [Facebook](#)

# **ATTACHMENT C**

**RE: Tentative GJ Schedule regarding incident of July 25, 2020 and involvement of Daniel Perry**

Guillermo Gonzalez <Guillermo.Gonzalez@traviscountytx.gov>

Tue 5/18/2021 3:33 PM

To: Clint Broden <clint@texascrimlaw.com>

Cc: Efrain De la fuente <Efrain.Delafuente@traviscountytx.gov>; Libby Lawson <Libby.Lawson@traviscountytx.gov>

Good Afternoon Mr Broden,

We have determined that the following items from your packet will be submitted to the grand jury as they present or raise clearly admissible relevant evidence:

Section I of your letter dated April 15, 2021

Attachment A credit card receipts

Attachment C photos of Perry's automobile, without comments as to what may have specifically caused the damage [ for example, 'a brick']

FYI, It has always been our intent to submit to the grand jury photos of Perry's automobile taken by APD, as well as photos of the rifle carried by Foster. We also intend to present evidence of Perry's text contacts with his female passenger, including the timing of those text, and proof that he was operating as an Uber driver on the evening of July 25, 2020. Perry's statement to the APD will also be presented. As always, please contact me with any questions or comments.

Guillermo González  
Director, Trial Division and Intake  
Travis County District Attorney's Office



# **ATTACHMENT D**

## Re: Tentative GJ Schedule regarding incident of July 25, 2020 and involvement of Daniel Perry

Clint Broden <clint@texascrimlaw.com>

Mon 5/17/2021 11:21 AM

To: Guillermo Gonzalez <Guillermo.Gonzalez@traviscountytexas.gov>

Guillermo-

Thank you for letting me know.

Of course, we had previously submitted a grand jury letter. While I understand that the ability to submit such a letter is not a right, the letter was consistent with the type of letter I have submitted to several other counties for presentation to grand juries. In addition, with the exception of the polygraph, I believe all of the information contained in the letter would be admissible at trial. For everybody's sake I think it would be beneficial for the grand jury to consider everything that a petit jury might hear in coming to its decision. Also, while polygraphs are, of course, not admissible at trial, I think this is something the grand jury would want to hear and, as I mentioned, I have always been able to present polygraphs to grand juries so the grand juries can give them whatever weight they believe they deserve.