Cause No. 1496318

THE STATE OF TEXAS	**§**	**IN THE 338TH DISTRICT COURT**
VS.	**§**	**OF**
DAVID ROBERT DALEIDEN	**§**	**HARRIS COUNTY, TEXAS**

STATE'S RESPONSE TO DEFENDANT'S MOTION TO QUASH INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the State of Texas, by and through the undersigned Assistant District Attorney for Harris County, Texas, and files this State's Response to Defendant's Motion to Quash Indictment in the above-styled and numbered cause, and would show the Court the following:

I. Procedural History

On January 25, 2016, the duly empaneled grand jury of the 232nd District Court of Harris County, Texas, presented indictments charging David Robert Daleiden, hereinafter Defendant, with the felony offense of Tampering with a Governmental Record and the misdemeanor offense of Prohibited Purchase and Sale of Human Organs. On April 14, 2016, Defendant filed in this Court a "Motion to Quash Indictment[,]" alleging as grounds for relief: (1) that the extension or holdover order issued by the 232nd District Court to extend the term of the grand jury was invalid; (2) that prosecutors violated the provisions of the Texas Code of Criminal Procedure which require that grand jury proceedings be kept secret; and (3) that the public disclosure of Defendant's indictment before the arrest warrant for Defendant had been executed and Defendant was placed in

custody or under bond was a harmful violation of Article 20.22(b) of the Code of Criminal Procedure.

II. Defendant Bears the Burden of Proof on a Motion to Quash; Trial Court has Discretion to Rule on the Motion Without a Hearing

The Texas Constitution guarantees criminal defendants the right to indictment by a grand jury for all felony offenses. TEX. CONST. art. I, § 10; *Cook v. State*, 902 S.W.2d 471, 475 (Tex. Crim. App. 1995). The filing of a valid indictment serves two functions: (1) it vests the trial court with jurisdiction over the felony offense; and (2) it provides the defendant with notice of the offense to allow him to prepare a defense. *Cook*, 902 S.W.2d at 475-76. Courts presume that an indictment was returned by a properly organized grand jury unless the record establishes otherwise. *Suit v. State*, 161 Tex. Crim. 22, 274 S.W.2d 701, 703 (1955); *State v. Flournoy*, 187 S.W.3d 621, 623 (Tex. App.—Houston [14th Dist.] 2006, no pet.). A trial court may not set aside, or quash, an indictment without the State's consent unless authorized to do so by constitution, statute, or common law. *State v. Terrazas*, 962 S.W.2d 38, 40-41 (Tex. Crim. App. 1998).

It is well-settled that a criminal defendant bears the burden of proof on a motion to quash, and that a trial court properly denies such a motion where the defendant offers no proof of the allegations contained in the motion, or where the record does not substantiate the defendant's claims. *See Wheat v. State*, 537 S.W.2d 20, 21 (Tex. Crim. App. 1976) ("The defendant has the burden of proof on a motion to quash an indictment or complaint."); *Worton v. State*, 492 S.W.2d 519, 520 (Tex. Crim. App. 1973) (rejecting the defendant's claim that the trial court erred in denying the defendant's motion to quash

because "[t]he motion to quash was not self-proving and the [defendant] offered no proof in support of his allegations."); *Moody v. State*, 57 Tex. Crim. 76, 79, 121 S.W. 1117, 1118 (1909) ("It is well settled in this state that the burden rests upon [the defendant] to bring himself within the terms of the statute, and to show a violation of same, before an indictment will be set aside and the defendant discharged."); *Rodriguez v. State*, -- S.W.3d --, Nos. 01-13-00447-CR, 01-13-00448-CR, 2016 WL 921584, at *3 (Tex. App.—Houston [1st Dist.] Mar. 10, 2016, no pet. h.) (same); *State v. Perez*, 948 S.W.2d 362, 364 (Tex. App.—Eastland 1987, pet. ref'd) (same); *see also Ray v. State*, 561 S.W.2d 480, 481-85 (Tex. Crim. App. 1977) (reiterating that the defendant bears the "burden of showing that the sanctity of the grand jury was violated" to prevail in his motion to quash);

A trial court has discretion to rule on a motion to quash without holding a hearing. *See* TEX. CODE CRIM. PROC. ANN. art. 28.01, §1(4) (providing that a trial court "*may* set any criminal case for a pre-trial hearing before it is set for trial upon its merits," including to determine any "[e]xceptions to the form or substance of the indictment[,]" but not *requiring* the court to do so) (emphasis added); *Hicks v. State*, 508 S.W.2d 400, 403 (Tex. Crim. App. 1974) (recognizing that a trial court has no obligation to hold a pretrial hearing to hear and rule on a defendant's motion to quash and, thus, does not abuse its discretion in declining to do so); *Rodriguez*, 2016 WL 921584, at *4 (concluding that the trial court did not abuse its discretion in ruling on the defendant's motion to quash without holding a hearing). An appellate court will not disturb a trial court's decision to rule on a motion to quash without a hearing unless it is clear that the trial court abused its

discretion by declining to do so. *See Hicks*, 508 S.W.2d at 403 (finding no abuse of discretion when trial court opted to not hold a hearing on the defendant's motion to quash); *Rodriguez*, 2016 WL 921584, at *3-4 (evaluating a trial court's decision to rule on a motion to quash for abuse of discretion). That is, an appellate court will not reverse a trial court's determination to resolve a motion to quash without a hearing unless the trial court's action in that regard was beyond the zone of reasonable disagreement. *See Buntion v. State*, 482 S.W.3d 58, 76 (Tex. Crim. App. 2016) ("The trial court abuses its discretion when its decision lies 'outside the zone of reasonable disagreement.'") (quoting *Apolinar v. State*, 155 S.W.3d 184, 186 (Tex. Crim. App. 2005)).

III. Defendant's Claim that the Indictment is Invalid because of a Supposedly-Improper Extension or Holdover Order is Meritless

Article 19.07 of the Texas Code of Criminal Procedure, titled "Extension Beyond Term of Period for Which Grand Jurors Shall Sit[,]" provides:

> If prior to the expiration of the term for which the grand jury was impaneled, it is made to appear by a declaration of the foreman or of a majority of the grand jurors in open court, that the investigation by the grand jury of the matters before it cannot be concluded before the expiration of the term, the judge of the district court in which said grand jury was impaneled may, by the entry of an order on the minutes of said court, extend, from time to time, for the purpose of concluding the investigation of matters then before it, the period during which said grand jury shall sit, for not to exceed a total of ninety days after the expiration of the term for which it was impaneled, and all indictments pertaining thereto returned by the grand jury within said extended period shall be as valid as if returned before the expiration of the term. TEX. CODE CRIM. PROC. ANN. art. 19.07.

Thus, a grand jury's investigation of matters already before it during its original term may continue into its extended term, and may even include new crimes which are related

to the original investigation, but which were committed after the original term expired. TEX. CODE CRIM. PROC. ANN. art. 19.07; *Flournoy*, 187 S.W.3d at 624; *see Suit*, 274 S.W.2d at 703 (rejecting the defendant's claim that his narcotics-sale indictment was invalid when the grand jury returned that indictment during its extension period, after being held over to continue its original-term investigation into narcotics trafficking, because "[t]he overall investigation appears to...have been the very kind and type of situation which the statute was designed to meet" and "[the defendant's] case was developed as part of such investigation.").

Tracking the language of Article 19.07, on December 16, 2015, the presiding judge of the 232nd District Court of Harris County, Texas, issued an extension order which first recounted that "the foreman of the July Term Grand Jury of the 232nd District Court, on behalf of a majority of the grand jurors, declared in open court that the investigation of certain matters before this grand jury cannot be concluded before the expiration of the term." (State's Exhibit A – Extension Order). The judge then expressly found in the order that the grand jury foreman's declaration was timely made prior to the expiration of the July Term Grand Jury of the 232nd District Court; that "the grand jury's investigation of matters currently before it cannot be concluded before the expiration of the term"; and that "extending the term of the July Term Grand Jury so that it may finish its investigations [was] in the best interests of justice." (State's Exhibit A – Extension Order). Thereafter, the judge's extension order proclaimed that the term of the July Term Grand Jury would be extended for a timeframe not to exceed a total of ninety days after the original expiration of the term for which the grand jury was impaneled, or "no later

than March 31, 2016." (State's Exhibit A – Extension Order). Further, the extension order explained that "all indictments returned by the grand jury pertaining to the matters under investigation by the July Term Grand Jury shall be as valid as if returned before the expiration of the term[,]" and ordered the Clerk of the Court to enter the extension order on the minutes of the 232nd District Court. (State's Exhibit A – Extension Order).

Defendant's first claim for relief in Defendant's motion to quash argues that this extension or "holdover" order is deficient "due to the lack of required specificity"; particularly, Defendant urges that the extension order "fail[s] to specifically state or articulate any specific individual or case that the grand jury would be holding over to investigate[,]" and, thus, that Defendant's indictment is "legally invalid because it was not rendered during the grand jury's original term." (MTQ – 1-2, 4-6).[1] Defendant's arguments are refuted by *Guerra v. State*, 760 S.W.2d 681 (Tex. App.—Corpus Christi 1988, pet. ref'd), in which the Thirteenth Court of Appeals of Corpus Christi directly rejected the same assertion that Defendant now advances. *See Guerra*, 760 S.W.2d at 684 (rebuffing Guerra's contention "that the [extension] order is void since it did not specify the matters being investigated."). The *Guerra* court found that the extension order in that case "specifically recites the statutory reason for extending the term of the grand jury" as set out in Article 19.07—that is, the investigation by the grand jury of matters before it which could not be concluded before the expiration of its original term—and, thus, concluded that the order did not require additional details about the particular matters under investigation for the extension to be valid. *Guerra*, 760 S.W.2d

[1] References to Defendant's Motion to Quash will be cited herein as (MTQ – [page number]).

at 684. Moreover, the *Guerra* court determined that "[t]he specificity suggested by [Guerra] would appear to conflict with the requirement of, and frustrate the purpose of, the secrecy of grand jury proceedings." *Guerra*, 760 S.W.2d at 684.

Accordingly, because here, as in *Guerra*, the extension order accurately recited the prerequisites, conditions, and timeframe for the order, as established by Article 19.07, the order was not required to specifically identify the particular matters under the grand jury's investigation to be valid, and Defendant's contentions to the contrary must fail. *See* TEX. CODE CRIM. PROC. ANN. art. 19.07; *Guerra*, 760 S.W.2d at 684. Hence, Defendant has not met his burden to show that the extension order extending the July Term Grand Jury of the 232nd District Court was invalid as to his case, and his motion to quash must fail in that regard. *See Suit*, 274 S.W.2d at 703; *see also Flournoy*, 187 S.W.3d at 623 (reiterating that when a defendant challenges "an order extending the grand jury's term, the defendant must show the order was invalid as to his case.").

IV. Defendant's Allegations that Prosecutors Violated Grand Jury Secrecy are Meritless

Defendant alleges in his motion to quash that the State's disclosure of "some or all of the evidence produced to the grand jury—including videos and other material produced by Daleiden—to the target of its investigation, Planned Parenthood Gulf Coast[,]" violated the statute requiring that grand jury proceedings be secret and, thus, that this Court should quash Defendant's indictment. (MTQ – 2). Defendant's arguments must fail because: (1) Defendant is incorrect that the State's disclosure of any of such complained-of items constituted a violation of the statutory provisions requiring

grand-jury secrecy, and (2) quashing the otherwise facially-valid indictment—which Defendant does not contest—is not an appropriate remedy even if, *arguendo*, any such provisions were violated.

The grand-jury secrecy provisions which are relevant to Defendant's motion to quash are contained in Article 20.02 of the Texas Code of Criminal Procedure. *See generally* TEX. CODE CRIM. PROC. ANN. art. 20.02 ("Proceedings Secret"). Subsection (a) of Article 20.02 provides the general rule that "[t]he proceedings of the grand jury shall be secret." TEX. CODE CRIM. PROC. ANN. art. 20.02(a). Subsection (g) provides: "The attorney representing the state may not disclose anything transpiring before the grand jury except as permitted by Subsections (c), (d), and (e)." TEX. CODE CRIM. PROC. ANN. art. 20.02(g). And, finally, Subsection (h) provides: "A subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury. This subsection may not be construed to limit a disclosure permitted by Subsection (c), (d), or (e)." TEX. CODE CRIM. PROC. ANN. art. 20.02(h).

A. The State's Disclosure Did Not Violate Any Grand-Jury Secrecy Statutes

None of the aforementioned grand-jury secrecy provisions can be reasonably interpreted to extend to, and prohibit disclosure of, videos or other evidence that the State obtains via a grand jury subpoena for potential presentation to a grand jury. Rather, the statutes explicitly encompass only the internal operations, discussions, and deliberations

that the grand jurors undertake, as well as the actual grand-jury subpoena or summons forms, themselves.

i. Article 20.02(a)

Appellate courts have interpreted the meaning and scope of the term "proceedings" in the general rule of Subsection (a) of Article 20.02 that "[t]he *proceedings* of the grand jury shall be secret" to encompass only internal matters that transpire in front of and between the grand jurors, such as witness testimony and deliberations. TEX. CODE CRIM. PROC. ANN. art. 20.02(a) (emphasis added); *see In re Reed*, 227 S.W.3d 273, 275-76 (Tex. App.—San Antonio 2007, no pet.); *Barnhart v. State*, No. 13-08-00511-CR, 2010 WL 3420823, at *11 (Tex. App.—Corpus Christi-Edinburg Aug. 31, 2010, pet. ref'd) (mem. op., not designated for publication).

In *In re Reed*, 227 S.W.3d 273 (Tex. App.—San Antonio 2007, no pet.), the Bexar County District Attorney's Office (BCDAO) sent three grand jury summonses to a school district's administrative offices and a conflict later arose between the BCDAO and the school district regarding whether the school district's lawyers could inform the school district's board members about the summonses, or whether the school district was required to keep the existence of the summonses secret, pursuant to Article 20.02(a). *Reed*, 227 S.W.3d at 275.[2] This conflict escalated into a mandamus proceeding, wherein the BCDAO sought to challenge the trial court's conclusion that the summonses were not secret, as well as the court's order quashing the non-disclosure language in the

[2] As is discussed in greater detail later, *Reed* was decided in March 2007 and the Legislature had not yet enacted Subsection (h) of Article 20.02. *See* Act of May 24, 2007, 80th Leg., R.S., ch. 628, § 1, 2007 Tex. Sess. Law Serv. Ch. 628 (H.B. 587) (Vernon's) (codified as TEX. CODE CRIM. PROC. ANN. art. 20.02(h)).

summonses. *Reed*, 227 S.W.3d at 275-76. In resolving this conflict, the Fourth Court of Appeals at San Antonio first reiterated the rules of statutory construction that "[a]ll words, phrases, and terms used in the Texas Code of Criminal Procedure are to be taken and understood in their usual acceptance in common language, except where specifically defined[,]" and that "[i]n construing a statute, courts consider its provisions as a whole rather than viewing them in isolation." *Reed*, 227 S.W.3d at 276; *see* TEX. CODE CRIM. PROC. ANN. art. 3.01. ("All words, phrases and terms used in this Code are to be taken and understood in their usual acceptation in common language, except where specifically defined."); *Nguyen v. State*, 1 S.W.3d 694, 696 (Tex. Crim. App. 1999) ("[W]e cannot interpret a phrase within a statute in isolation; we must look at the phrase *in situ*[,] or in context of the entire statute."). The *Reed* court also acknowledged that it was "aware of the policy goals behind grand jury secrecy and the rule that statutes governing grand juries be afforded 'reasonable and liberal construction'." *Reed*, 227 S.W.3d at 276 (quoting *Stern v. State ex rel Ansel*, 869 S.W.2d 614, 619-20 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *see* TEX. CODE CRIM. PROC. ANN. art. 1.26 ("The provisions of this Code shall be liberally construed, so as to attain the objects intended by the Legislature: The prevention, suppression and punishment of crime.").

Then, with these considerations in mind, the *Reed* court determined that, "[v]iewed in context of surrounding provisions," and in the absence of any statutory definition, "the term 'proceedings' as used in Article 20.02(a) could reasonably be understood as encompassing matters that *take place before the grand jury*, such as witness testimony and deliberations." *Reed*, 227 S.W.3d at 276 (explaining that the

surrounding, related grand-jury secrecy provisions concern matters occurring or transpiring in the grand jurors' presence) (emphasis added). Further, the *Reed* court explained that, at the time of its decision, "[i]n constrast to the federal rules, the Texas Code of Criminal Procedure does not expressly provide that a grand jury subpoena or summons itself is secret." *Reed*, 227 S.W.3d at 276 (citing FED. R. CRIM. P. 6(e)(6) ("Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.")).

In *Barnhart v. State*, No. 13-08-00511-CR, 2010 WL 3420823 (Tex. App.—Corpus Christi-Edinburg Aug. 31, 2010, pet. ref'd) (mem. op., not designated for publication), the Thirteenth Court of Appeals at Corpus Christi-Edinburg was tasked with determining the scope of Article 20.02(a)'s term "proceedings" in the context of whether that provision requires that the identities of the grand jurors be kept secret. *Barnhart*, 2010 WL 3420823, at *9-12. Affirming the statutory construction and reasoning that the Fourth Court of Appeals employed in *Reed*, the *Barnhart* court agreed that "the term 'proceedings' as used in [A]rticle 20.02(a) encompasses matters that take place before the grand jury, including witness testimony and the grand jury's deliberations[,]" but does not extend to external matters or information that does not actually take place before the grand jury—such as the identities of the grand jurors. *Barnhart*, 2010 WL 3420823, at *11. Thus, the *Barnhart* court concluded that Subsection (a) does not require that grand jurors' identities be kept secret and held that the trial court erred in deciding otherwise. *Barnhart*, 2010 WL 3420823, at *11.

Accordingly, in light of these cases and their logical conclusion that Article 20.02(a) applies to, and requires secrecy for, only internal matters and events that occur in front of or between the grand jurors, such as witness testimony and deliberations, it is clear that the attorneys for the State would not violate Subsection (a) by disclosing external evidence or materials that the attorneys obtain via a grand jury subpoena or summons for potential presentation to the grand jury.

ii. Article 20.02(g)

The language of Subsection (g) of Article 20.02 specifically applies to the attorneys representing the State, but unambiguously limits its secrecy protection to only matters that occur in the presence of the grand jury; hence, the provision would not bar the attorneys representing the State from disclosing materials or information that are external to the grand jury proceedings, such as evidence obtained through a grand jury subpoena. *See* TEX. CODE CRIM. PROC. ANN. art. 20.02(g) ("The attorney representing the state may not disclose anything *transpiring before* the grand jury except as permitted by Subsections (c), (d), and (e).") (emphasis added). However, even if the explicit terms of Subsection (g) are somehow considered ambiguous, when the provision is properly interpreted, adhering to the principles of statutory construction, the same analysis and conclusion as that which applied to Subsection (a) results. Like Subsection (a), Subsection (g), when considered in context and according to its plain language, may be reasonably understood to specifically refer to only matters actually occurring or taking place in front of the grand jury, such as witness testimony, dialog between the grand jurors and persons authorized to be present in the grand jury room while the grand jury is

conducting proceedings, and the grand jurors' deliberations. *See* TEX. CODE CRIM. PROC. ANN. art. 20.02(g) ("The attorney representing the state may not disclose anything *transpiring before* the grand jury....") (emphasis added); *cf. Reed*, 227 S.W.3d at 275-76 (concluding that "proceedings," as used in Article 20.02(a) refers to only matters occurring in front of the grand jury); *Barnhart*, 2010 WL 3420823, at *11 (agreeing "that the term 'proceedings' as used in [A]rticle 20.02(a) encompasses matters that take place before the grand jury, including witness testimony and the grand jury's deliberations[,]" but excluding such external information as the identities of the grand jurors, which the grand-jury secrecy statutes do not require be kept secret).

Nothing about the history or origins of Subsection (g) contradicts this interpretation. The Legislature added Subsection (g)—as well as adding Subsections (c)-(f) and expanding Subsection (b)—to Article 20.02 in 1995[3] as a reaction to the events that resulted in the litigation *Stern v. State ex rel. Ansel*, 869 S.W.2d 614 (Tex. App.—Houston [14th Dist.] 1994, writ denied). *See* (State's Exhibit B – House Research Organization Bill Analysis of S.B. 1074, p. 2). In *Stern*, a former Fort Bend County District Attorney publicly released transcripts of witness testimony given during grand jury proceedings after the grand jury declined to indict another county official for perjury. *Stern*, 869 S.W.2d at 624. In the appeal of a civil removal action against Stern, the Fourteenth Court of Appeals of Houston rejected Stern's argument that the then-existing version of Article 20.02 did not expressly prohibit prosecutors from making grand jury testimony public, finding, instead, that such disclosure was improper because, "[v]iewing

[3] *See* Act of May 27, 1995, 74th Leg., R.S., ch. 1011, § 2, 1995 Tex. Sess. Law Serv. Ch. 1011 (S.B. 1074) (Vernon's) (codified as TEX. CODE CRIM. PROC. ANN. art. 20.02(g)).

the scheme of the Code as a whole, grand jury proceedings, including the taking of testimony, are secret." *See Stern*, 869 S.W.2d at 621-23. The Fourteenth Court of Appeals also rejected Stern's arguments that he was entitled to release the grand jury transcripts pursuant to the First Amendment, and that he was required to provide copies of the transcripts—which Stern claimed contained exculpatory material—to the defense in a related case, pursuant to the State's discovery obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and the Code of Criminal Procedure. *See Stern*, 869 S.W.2d at 623-27.

As stated above, in the wake of *Stern* and to prevent the disclosure of grand jury testimony or transcripts, as occurred in *Stern*, the Legislature added Subsection (g) to Article 20.02 to clearly extend to the prosecution the requirement that the inner-workings, proceedings, or matters transpiring before the grand jury be kept secret. *See* (State's Exhibit B – House Research Organization Bill Analysis of S.B. 1074, p. 2); *see also* Act of May 27, 1995, 74th Leg., R.S., ch. 1011, § 2, 1995 Tex. Sess. Law Serv. Ch. 1011 (S.B. 1074) (Vernon's) (codified as TEX. CODE CRIM. PROC. ANN. art. 20.02(g)). But, again, because Subsection (g) does not explicitly or implicitly relate to any evidence or information that the attorneys for the State obtain via a grand jury subpoena, and because the State, here, did not disclosure any transcripts or other matters or proceedings which occurred in the grand jury's presence, neither Subsection (g) nor *Stern* operated as a bar to the State's release of the complained-of videos in this case. *See* TEX. CODE CRIM. PROC. ANN. art. 20.02(g) (explicitly prohibiting the prosecution from "disclos[ing]

anything *transpiring before* the grand jury[,]" only) (emphasis added); *cf. Reed*, 227 S.W.3d at 275-76; *Barnhart*, 2010 WL 3420823, at *11.

iii. Article 20.02(h)

Similarly, the attorneys representing the State also did not violate Subsection (h) of Article 20.02. After *Reed* was decided, which turned upon the fact that Article 20.02 contained no explicit secrecy protection for grand-jury subpoena and summons forms, the Texas Legislature added Subsection (h) to Article 20.02 to require that, like the federal rules provide, "[a] subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury." *See* Act of May 24, 2007, 80th Leg., R.S., ch. 628, § 1, 2007 Tex. Sess. Law Serv. Ch. 628 (H.B. 587) (Vernon's) (codified as TEX. CODE CRIM. PROC. ANN. art. 20.02(h)). Significantly, though, the plain language of Subsection (h) shows that that provision does not mandate that evidence or information that is *obtained through* a grand jury subpoena must be kept secret; rather, Subsection (h) specifically requires only that a grand jury subpoena or summons, itself, be kept secret. *See* TEX. CODE CRIM. PROC. ANN. art. 20.02(h) (explicitly commanding that "[a] subpoena or summons relating to a grand jury proceeding or investigation must be kept secret[,]" but remaining entirely silent with regard to any material or content that is the subject of a grand jury subpoena or summons). Had the Legislature intended for evidence or materials obtained through a grand jury subpoena or summons to be kept secret—instead of just the grand jury subpoena or summons form, itself—the Legislature could have explicitly required that when the Legislature added Subsection (h) to Article

20.02 in 2007,[4] or at any time during the nearly eleven years since then. *See Johnson v. State*, 967 S.W.2d 848, 849 (Tex. Crim. App. 1998) ("Had the Legislature intended to make a provision regarding the knowledge of the victim's age it would have expressly included that requirement within Section 21.11 of the Texas Penal Code. Absence of such express language proves otherwise."); *Long v. State*, 931 S.W.2d 285, 290 (Tex. Crim. App. 1996) (observing that "had the legislature intended to apply a reasonable person standard [to the sexual harassment statute], they easily could have specified one, or a clear synonym[,]" but it did not); *Lovell v. State*, 525 S.W.2d 511, 514-15 (Tex. Crim. App. 1975) (refusing to infer a construction of a statute that the plain language of the statute did not expressly allow because "[i]f the Legislature had intended such a result, it would have clearly said so."). Accordingly, because the Legislature did not and has not seen fit to do so with clear, definitive, and express language, an attorney representing the State does not violate Subsection (h) by disclosing evidence or materials that the attorney obtains through a grand jury subpoena or summons, as opposed to failing to keep the grand jury subpoena or summons form, itself, secret.

In sum, when the grand-jury secrecy provisions are properly read together in context, rather than incorrectly, in isolation, it is easily apparent that the overall aim of the statutes is to prevent disclosure of the internal events, proceedings, and deliberations that occur in the grand jury room, in the presence of the grand jurors, as opposed to matters or information which is external to such operations. In other words, nothing in Subsections (a), (g), or (h), or any other statutory provision pertaining to grand-jury

[4] Act of May 24, 2007, 80th Leg., R.S., ch. 628, § 1, 2007 Tex. Sess. Law Serv. Ch. 628 (H.B. 587) (Vernon's) (codified as TEX. CODE CRIM. PROC. ANN. art. 20.02(h)).

secrecy, specifically requires that evidence or materials that are obtained through a grand jury subpoena be kept secret, rather than just the proceedings transpiring before the grand jurors and any grand-jury subpoena or summons forms that are issued.

Here, as the attached affidavit of Josh Schaffer, counsel for Planned Parenthood Gulf Coast, makes clear, there is absolutely no merit to Defendant's allegations that the prosecutors violated any of the grand-jury secrecy statutes by improperly revealing or disclosing any of the internal proceedings of, or anything transpiring before, the grand jury, or the existence of a subpoena or summons relating to any grand jury proceeding or investigation. *See* (State's Exhibit C – Affidavit of Josh Schaffer). To the contrary, disclosure of the complained-of videos without any reference or allusion to a grand jury subpoena or summons, anything transpiring before the grand jury, or any internal grand jury proceeding did not violate Subsections (a), (g), or (h) of Article 20.02 and, hence, did not violate the tenets of grand-jury secrecy.

Defendant has failed to meet his burden of proof to substantiate his motion to quash on this basis.

B. Quashing Defendant's Otherwise Facially-Valid Indictment is Not an Appropriate Remedy

A motion to quash challenges whether the charging instrument alleges "*on its face* the facts necessary to show that the offense was committed, to bar a subsequent prosecution for the same offense, and to give the defendant notice of precisely what he is charged with." *DeVaughn v. State*, 749 S.W.2d 62, 67 (Tex. Crim. App. 1988) (emphasis added); *Laurent v. State*, 454 S.W.3d 650, 653 (Tex. App.—Houston [1st Dist.] 2014, no

pet.); *see* TEX. CODE CRIM. PROC. ANN. art. 27.03 (listing grounds to set aside an indictment, including that the indictment was returned by fewer than nine grand jurors, that an unauthorized person was present while the grand jurors deliberated or voted, and that the grand jury was illegally impaneled); TEX. CODE CRIM. PROC. ANN. art. 27.08 (listing the only permissible exceptions to the form of an indictment); TEX. CODE CRIM. PROC. ANN. art. 27.09 (listing the only permissible exceptions to the form of an indictment). Thus, a motion to quash may be used only to attack the facial validity of the indictment, or to the challenge the indictment based upon the reasons enumerated in Articles 27.03, 27.08, and 27.09—not to contest evidentiary matters which are extraneous to the four corners of the indictment. *See* TEX. CODE CRIM. PROC. ANN. art. 27.03; TEX. CODE CRIM. PROC. ANN. art. 27.08; TEX. CODE CRIM. PROC. ANN. art. 27.09; *State v. Rosenbaum*, 910 S.W.2d 934, 937-38 (Tex. Crim. App. 1994) (stating that a trial court errs by considering evidence beyond the face of the indictment when considering a motion to quash); *cf. Lawrence v. State*, 240 S.W.3d 912, 916 (Tex. Crim. App. 2007) (explaining that a motion to quash cannot properly be used to challenge the sufficiency of the State's evidence); *Donald v. State*, 453 S.W.2d 825, 827 (Tex. Crim. App. 1969) (finding no error in denying the defendant's motion to quash which complained of the fact "that the witnesses whose names were listed on the back of the indictment were not called to testify before the Grand Jury[,]" given that such complaint is not among the permissible grounds for setting aside an indictment).

Here, Defendant's allegations regarding grand-jury secrecy do nothing to question the facial validity of the indictment, itself, but rather contest only the actions of the

attorneys representing the State during the grand jury proceedings. Hence, even assuming *arguendo* that there was any violation of grand-jury secrecy, such infraction does not amount to a due process or other constitutional violation. Therefore, quashing Defendant's indictment on that basis would be an inappropriate remedy. *See Laurent* 454 S.W.3d at 653 (holding that the trial court did not err in denying the defendant's motion to quash which "did not identify any facial defects in the [charging instrument.]"); *Hicks v. State*, 630 S.W.2d 829, 834, 837-38 (Tex. App—Houston [1st Dist.] 1982, pet. ref'd) (finding no failure in refusing to quash the defendant's indictment based on the defendant's claim that grand-jury secrecy was violated, given that the defendant's motion to quash "did not question the sufficiency of the indictment to allege the crime[;] It questioned only the actions of the grand jury."); *cf. State v. Terrazas*, 970 S.W.2d 157, 160 (Tex. App.—El Paso 1998) (finding that prosecutorial misconduct in accepting compensation from the Department of Human Services to prosecute welfare fraud cases did not rise to the level of a due process violation because it did not significantly compromise the fundamental fairness of the proceedings and, thus, dismissal of the defendant's indictment with prejudice was not an appropriate remedy), *aff'd*, 4 S.W.3d 720 (Tex. Crim. App. 1999).

V. A Harmless, Technical Violation of Article 20.22(b) Related to the Procedure and Timing of the Public Disclosure of Defendant's Indictment Does Not Require that the Otherwise-Valid Indictment be Quashed

Lastly, Defendant's argument concerning the fact that Defendant's indictment was made available to Defendant and the public before the capias for Defendant was served

and Defendant was placed in custody or under bond also falls short, given that that oversight was a mere technical, inconsequential violation of Article 20.22(b) of the Code of Criminal Procedure.

The current version of Article 20.22 of the Code of Criminal Procedure, which the Legislature divided into two subsections from a single provision in 2011,[5] provides:

> (a) The fact of a presentment of indictment by a grand jury shall be entered in the record of the court, if the defendant is in custody or under bond, noting briefly the style of the criminal action, the file number of the indictment, and the defendant's name.
>
> (b) If the defendant is not in custody or under bond at the time of the presentment of indictment, the indictment may not be made public and the entry in the record of the court relating to the indictment must be delayed until the capias is served and the defendant is placed in custody or under bond. TEX. CODE CRIM. PROC. ANN. art. 20.22.

In *Reese v. State*, 142 Tex. Crim. 254, 151 S.W.2d 828 (1941), the Texas Court of Criminal Appeals interpreted a previous, consolidated, but substantially similar iteration of Article 20.22[6] and explained that the purpose of the statute's requirement that an indictment not be made public until the defendant has been taken into custody or placed under bond is to "prevent[] defendants from hearing of their indictment before arrest, and possibly avoid[] apprehension." *See Reese*, 151 S.W.2d at 835.

Relying upon and applying *Reese's* statutory-purpose emphasis, the First Court of Appeals at Houston in *Hawkins v. State*, 792 S.W.2d 491 (Tex. App.—Houston [1st

[5] *See* Act of May 24, 2011, 82nd Leg., R.S., ch. 278, § 2, 2011 Tex. Sess. Law Serv. Ch. 278 (H.B. 1573) (Vernon's) (codified as TEX. CODE CRIM. PROC. ANN. art. 20.22(b)).

[6] Originally codified as Article 394 of the Code of Criminal Procedure, the statute stated: "The fact of a presentment of indictment in open court by a grand jury shall be entered upon the minutes of the court, noting briefly the style of the criminal action and the file number of the indictment, but omitting the name of the defendant, unless he is in custody or under bond." *Reese*, 151 S.W.2d at 835 (citing TEX. CODE CRIM. PROC. ANN. art. 397 (1876) (repealed 1965)).

Dist.] 1990, no pet.), addressed whether another, similar technical violation of Article 20.22—a discrepancy between the file number on the indictment and the file number listed in the memorandum of true bills that was entered on the minutes of the district court—warranted the quashing of the defendant's indictment, as the defendant claimed. *Hawkins*, 792 S.W.2d at 493-94. The *Hawkins* court held that it did not and, thus, that the trial court did not err in denying the defendant's motion to quash in that respect. *Id.* The court explained that because the complained-of procedural irregularity was a mere typographical error which did not prevent the purpose of Article 20.22 relevant to that case—to ensure that persons are tried on only true bills—from being effected, the technical violation was immaterial. *Hawkins*, 792 S.W.2d at 493-94.

Similarly, in *Crenshaw v. State*, No. 13-00-00692-CR, 2002 WL 34249771 (Tex. App.—Corpus Christi-Edinburg May 23, 2002, pet. ref'd) (not designated for publication), the Thirteenth Court of Appeals evaluated whether another technical violation of Article 20.22—the failure of the minutes of the district court to show the fact of the presentment of the defendant's indictment—required the trial court to grant the defendant's motion to quash the indictment on that basis. *Crenshaw*, 2002 WL 34249771, at *3. Like the *Hawkins* court, the *Crenshaw* court concluded that the complained-of error was a mere technical violation of Article 20.22 which did not impair the purpose of the statute. *Crenshaw*, 2002 WL 34249771, at *3. Further, the *Crenshaw* court observed that "[s]uch technical requirements as those contained in [A]rticle 20.22 have been held to be 'merely directory despite the use of the word "shall" therein.'" *Crenshaw*, 2002 WL 34249771, at *3 (citing *Jenkins v. State*, 468 S.W.2d 432, 435 (Tex.

Crim. App. 1971) (holding that "[t]he statutory provision that the names of the witnesses upon whose testimony the indictment is found shall be endorsed thereon is directory and not mandatory."). Accordingly, as in *Hawkins*, the court in *Crenshaw* rejected the defendant's claim that the technical violation of Article 20.22 required that his indictment be quashed, and affirmed the trial court's ruling to deny the defendant's motion to that effect. *Crenshaw*, 2002 WL 34249771, at *3-4.

Here, given that Defendant made no attempt to avoid apprehension and, in fact, voluntarily surrendered himself into custody just prior to his first court appearance, it is clear that the purpose of Article 20.22(b)—to prevent defendants from fleeing or avoiding apprehension upon learning of their indictment[7]—was not thwarted by the fact that Defendant's indictment became public before the warrant for his arrest was executed and he was placed under bond. Moreover, as discussed previously, Defendant does not complain of any facial defects to his indictment; rather, Defendant argues only that a technical violation of Article 20.22(b) occurred with the procedure and timing of the public disclosure of his indictment. But because that procedural irregularity was minor and harmless, and in no way frustrated the purpose of the statute, it does not require that Defendant's indictment be quashed. *Cf. Crenshaw*, 2002 WL 34249771, at *3 (concluding that the failure of the district court's minutes to show the fact that the defendant's indictment had been presented was a mere technical violation of Article 20.22 which did not affect the purpose of the statute and, thus, did not require that the defendant's otherwise-valid indictment be quashed); *Hawkins*, 792 S.W.2d at 493-94

[7] *See Reese*, 151 S.W.2d at 835.

(holding that a discrepancy between the file number shown on the district court's minutes and the actual file number of the indictment did not require the otherwise-valid indictment to be quashed, given that the error was minor and did not affect the purpose of Article 20.22). This Court should reject Defendant's arguments in this regard, as well.

VI. Conclusion

Defendant's motion to quash should be denied in its entirety because, first, the district court's extension or holdover order to extend the term of the grand jury was valid. Second, Defendant's contention that the State's disclosure of videos or other evidence that the State obtained via a grand jury subpoena violated any of the statutory provisions requiring that grand jury proceedings be kept secret is false and untenable when the grand-jury secrecy statutes are properly read and understood. Third, even if any grand-jury secrecy violations occurred, they did not amount to a due process violation and, thus, quashing Defendant's otherwise-valid indictment would not be an appropriate remedy. And, lastly, because the technical violation of Article 20.22(b) related to the procedure and timing of the public disclosure of Defendant's indictment was completely harmless and did not frustrate the purpose of that statute, that procedural irregularity also does not require that Defendant's otherwise-valid indictment be quashed.

WHEREFORE, PREMISES CONSIDERED, the State of Texas, by and through the undersigned Assistant District Attorney for Harris County, Texas, respectfully prays that this Court will deny the Defendant's Motion to Quash Indictment in its entirety.

Respectfully submitted,

DEVON ANDERSON
District Attorney
Harris County, Texas

/s/ *Melissa Hervey*

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Cause No. 1496318

THE STATE OF TEXAS	**§**	**IN THE 338TH DISTRICT COURT**
VS.	**§**	**OF**
DAVID ROBERT DALEIDEN	**§**	**HARRIS COUNTY, TEXAS**

ORDER

Having fully considered the filings and arguments of both parties, this Court hereby ORDERS that Defendant's "Motion to Quash Indictment" is DENIED in its entirety.

Signed on this _____ day of _____, 2016.

_____
Hon. Brock Thomas
Judge Presiding, 338th District Court
Harris County, Texas

CERTIFICATE OF SERVICE

This is to certify that on May 19, 2016, the undersigned attorney served a true and accurate copy of the foregoing State's Response to Defendant's Motion to Quash Indictment upon Terry W. Yates, attorney of record for Defendant, David Robert Daleiden, via email to the following address:

tyates@yateslawoffices.com

/s/ *Melissa Hervey*

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STATE'S EXHIBIT A

Extension Order of the 232nd District Court

JULY TERM	§	**IN THE DISTRICT COURT OF**
	§	
	§	**HARRIS COUNTY, TEXAS**
	§	
HARRIS COUNTY GRAND JURY	§	**232ND JUDICIAL DISTRICT**
	§	
	§	

EXTENSION ORDER

Pursuant to Texas Code of Criminal Procedure Art. 19.07, on December 16, 2015, the foreman of the July Term Grand Jury of the 232nd District Court, on behalf of a majority of the grand jurors, declared in open court that the investigation of certain matters before this grand jury cannot be concluded before the expiration of the term.

The Court **FINDS** that:

1) the foreman's declaration is made prior to the expiration of the term of the July Term Grand Jury;

2) the grand jury's investigation of matters currently before it cannot be concluded before the expiration of the term;

3) extending the term of the July Term Grand Jury so that it may finish its investigations is in the best interests of justice.

Accordingly, the Court **ORDERS** the term of the 232nd District Court's July Term Grand Jury extended for the purpose of concluding the investigation of matters currently before it. This extension, however, shall not exceed a total of ninety days after the expiration of the term for which the grand jury was impaneled and shall expire on its own terms no later than March 31, 2016.

The Court **ORDERS** that all indictments returned by the grand jury pertaining to the matters currently under investigation by the July Term Grand Jury shall be as valid as if returned before the expiration of the term.

The Court further **ORDERS** the Clerk of the Court to enter this Order on the minutes of the 232nd District Court pursuant to Article 19.07 of the Texas Code of Criminal Procedure.

Signed (date): 12-16-15

Mary Lou Keel
Judge, 232nd District Court

DISTRICT COURT OF HARRIS COUNTY, TEXAS

STATE'S EXHIBIT B

House Research Organization Bill Analysis of S.B. 1074

SUBJECT: Secrecy in grand jury proceedings

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 5 ayes — Place, Talton, Farrar, Nixon, Pickett

0 nays

4 absent — Greenberg, Hudson, Pitts, Solis

SENATE VOTE: On final passage, May 5 — voice vote

WITNESSES: No public hearing

BACKGROUND: The deliberations of a grand jury are secret and any grand juror or bailiff who divulges anything that transpires are can be punished by imprisonment of up to 30 days and a fine of up to $500. Witnesses are required to swear that they will not divulge any matter about which they were interrogated and that they will keep the grand jury proceedings secret. Witnesses are can be punished by a fine of up to $500 and imprisonment of up to six months.

DIGEST: SB 1074 would make the proceedings of a grand jury secret. A grand juror, bailiff, interpreter, stenographer or other person recording the proceedings who disclosed anything that transpired before the grand jury, whether or not it was recorded, would be subject to a punishment of a fine of up to $500 and imprisonment of up to 30 days.

Prosecutors would be prohibited from disclosing anything that transpired before the grand jury. Prosecutors would be able to disclose records, transcriptions of the records and information from the proceedings to grand jurors, another grand jury, a law enforcement agency or a prosecutor, in the performance of their official duties. The prosecutor would have to warn the person that they have a duty to keep the information secret. Anyone who disclosed information for unauthorized purposes would be subject to a fine of up to $500 and imprisonment of up to 30 days.

Defendants would be able to petition a court to order information disclosed in connection with a judicial proceeding. The court could grant the request upon showing of a particularized need. All persons who are parties to the judicial proceedings and other persons as required by the court would be entitled to receive notice of the defendants' request and to appear before the court. The court would have to allow interested parties to present arguments concerning the continuation or end to the secrecy requirement. Persons who receive information and disclose it would be subject to a fine of up to $500 and imprisonment of up to 30 days.

SB 1074 would restrict the persons who may be present in a grand jury room during proceedings to the grand jurors, bailiffs, the prosecutor, witnesses, interpreters, and stenographer or other person recording the proceedings. Only grand jurors could be in the room while the grand jury is deliberating.

Questions asked by the grand jury or the prosecutor to a person accused or suspected of a crime and the person's testimony would have to be recorded. Prosecutors would be responsible for maintaining all records, except a stenographers notes, and transcriptions of those records.

SB 1074 would take effect September 1, 1995.

SUPPORTERS SAY:

SB 1074 would ensure that grand jury proceedings are secret and prevent prosecutors and others who receive this secret information from releasing it to the public. It is important to extend the current secrecy requirement for grand jury deliberations to all proceedings to ensure the free exchange of information in a grand jury room and that the information will be kept confidential. This bill would simply codify current case law and practice.

The bill would prohibit prosecutors from disclosing secret information unless it is in the official course of business. Most prosecutors have operated as if the grand jury secrecy requirements applied to them. However, recent incidents involving reporters allegedly receiving records relating to a case against U.S. Senator Kay Bailey Hutchison and a Fort Bend County district attorney illegally releasing grand jury testimony to the press and the public illustrate the need to extend the secrecy requirement to prosecutors. Prosecutors' right to free speech does not extend to disclosing

secret information that they learn during grand jury proceedings. The bill would not hinder prosecutors in doing their jobs because it would allow them to share information with law enforcement officers or others as their duties demand. The bill would require that these persons also keep the information secret.

The bill also would make it illegal for others to receive and disclose secret information. This would prevent persons and the media from revealing information that is confidential and should be kept secret. Revealing this information can hurt the prosecution of a case and have a chilling effect on witnesses testimony.

SB 1074 would ensure that defendants can have access to grand jury information if it is necessary by authorizing defendants to ask courts to release information.

OPPONENTS SAY:

Provisions making it criminal for persons to receive and disclose information could result in an unconstitutional prior restraint on the media. Courts have held that information that is legally obtained can be published. SB 1074 would impede the news media and citizens from reporting on grand jury information and restrict the public's access to government information. The bill could have a chilling effect on persons who may want to talk about a case, but not their specific testimony, who would be afraid that they could be accused of revealing secret information. Penalties should be focused on those who break the law requiring secrecy, not the media or the public. The media already abides by adequate rules to keep testimony secret.

SB 1074 is unnecessary because most of the provisions are required by current case law.

STATE'S EXHIBIT C

Affidavit of Josh Schaffer

AFFIDAVIT OF JOSH SCHAFFER

STATE OF TEXAS §
§
COUNTY OF HARRIS §

My name is Josh Schaffer. I am 39 years old. I am a lawyer with an office at 1021 Main, Suite 1440, Houston, Texas 77002. I have been licensed to practice law in Texas since November of 2002.

I represented Planned Parenthood Gulf Coast (PPGC) in the criminal investigation that the Harris County District Attorney's Office (HCDAO) conducted into allegations that PPGC unlawfully sold fetal tissue for valuable consideration. That investigation commenced in August of 2015 and concluded with a grand jury's decision to indict David Daleiden and Sandra Merritt for various offenses on January 25, 2016. Neither PPGC nor any of its employees were charged with any crimes as a result of the investigation.

I have read the motion to quash (MTQ) the felony indictment in cause number 1496318 that counsel for Daleiden filed on April 14, 2016. I am making this affidavit at the request of Melissa Hervey, an assistant district attorney with the HCDAO.

As soon as PPGC became the target of this investigation in August of 2015, I made it a priority to try to obtain the raw, unedited, complete video footage that Daleiden had recorded at PPGC on April 9, 2015. This footage would contain the

best evidence of what occurred. I believed that it would benefit PPGC by demonstrating that neither it nor any of its employees committed any crimes or contemplated the commission of any crimes during the encounter with Daleiden and Merritt.

As soon as I made contact with HCDAO prosecutors in August of 2015, I began requesting the unedited video footage. Sunni Mitchell, the prosecutor who was leading the HCDAO investigation, said that she was not opposed to giving me that footage. However, she said that the HCDAO did not have any video footage other than what was available to the public on YouTube. I suggested that she request the unedited video footage from the Attorney General's Office. In time, I learned that she obtained it from that Office. However, I was told that the Attorney General's Office agreed to give it to the HCDAO on the condition that the HCDAO not give it to PPGC. Mitchell told me that she would try to obtain the footage by other means. I never asked how she planned to do that. I assumed that she would ask Daleiden for it directly.

Mitchell told me on December 1, 2015, that Daleiden was represented locally by Murphy Klasing. Mitchell said that Klasing told her that he would produce the unedited video footage to the HCDAO. She also said that she would tell him that she intended to give it to me. She did not tell me, nor did I consider, that Klasing would produce it pursuant to a grand jury subpoena.

The HCDAO produced to me what it asserted was the unedited video footage on December 18, 2015. I gave it to Katie Beth Gottlieb, general counsel for PPGC, to review. By December 22, 2015, I became concerned that some of the video footage that Daleiden produced to the HCDAO was protected by a temporary restraining order (TRO) that was issued by a federal district court in California as the result of litigation between the National Abortion Federation (NAF) and Daleiden. I immediately brought that concern to Mitchell's attention. She told me on December 23 that Klasing told her that his client had assured him that none of the video footage that Klasing produced to the HCDAO was covered by the TRO. By December 28, I continued to have a good faith concern that Daleiden's production of some video footage might be in violation of the TRO. I notified the HCDAO of that concern and gave Mitchell's contact information to Derek Foran, counsel for NAF.

At no time during the course of the HCDAO investigation did I inquire about, nor did any HCDAO prosecutor reveal to me, any aspect of any grand jury activity. I knew that such information was confidential and could not be disclosed. I did not know if prosecutors were presenting the results of their investigation to a grand jury. I did not know what witnesses, if any, were testifying before a grand jury. Not until after the indictments were issued did I learn that a grand jury had been "held over" beyond its term to continue its investigation into this matter.

The motion to quash alleges that, "throughout the instant grand jury proceedings, prosecutors provided some or all of the evidence produced to the grand jury—including the TRO videos and other material produced by Daleiden—to the target of its investigation, [PPGC]" (MTQ at 2). To this day, I do not know what evidence HCDAO prosecutors presented to the grand jury. The only tangible thing that could be described as "evidence" that I recall receiving from the HCDAO during this investigation was the unedited video footage recorded by Daleiden. However, I did not know and did not ask how the HCDAO obtained that material. For all I knew, Daleiden produced it to the HCDAO voluntarily without a grand jury subpoena because it was my understanding that he had produced it voluntarily to the Attorney General's Office before there were any investigations. I did not know then and do not know now if the HCDAO ever presented any of that video footage to a grand jury. I do not know to what the motion refers when it asserts that "other material produced by Daleiden" was provided to PPGC.

The motion to quash also asserts that I made statements to the media after the indictments were issued that "confirmed that [I] 'explicitly pushed prosecutors' to charge Mr. Daleiden and Sandra Merritt" (MTQ at 2). Throughout the investigation, I made several comments to prosecutors and law enforcement agents related to my belief that the evidence established that Daleiden and Merritt had committed crimes when they used false driver's licenses to enter PPGC on April 9,

2015, and when Daleiden thereafter offered to purchase fetal tissue from PPGC for valuable consideration. I did not have to make that point very forcefully because I believed that it was self-evident to the entire prosecution team.

For most of the investigation, PPGC did not know the true identity of Merritt because she had used a false name ("Susan Tennenbaum") when she visited PPGC on April 9, 2015. The HCDAO prosecutors told me that they did not know her identity. Sometime during early January, I learned of her true identity as the result of depositions that she gave in a civil lawsuit in state court in California on December 29, 2015, and that Daleiden gave on December 30. I provided her identifying information to the HCDAO on January 10, 2016. I did not wait until after I knew of her true identity to advise prosecutors of my belief that she committed a crime when she used a false driver's license to enter PPGC.

Mitchell called me on the phone on the afternoon of January 25, 2016, to notify me that a grand jury had decided to take no action against PPGC. At first, it was not clear to me if that meant that PPGC had been "no-billed" or if it meant that the grand jury did not even vote on whether to indict PPGC. I questioned her about what that meant. I knew that a "no-bill" would be a public record on file with the district clerk's office. Because I knew that Mitchell was prohibited from revealing anything that the grand jury told her, I asked her if there would be a "no-bill" of PPGC or any of its employees on file with the district clerk. She said that

there would not be any "no-bills." I then asked her if the absence of any "true bills" and "no-bills" meant that the grand jury did not even vote on whether to indict PPGC and any of its employees. She repeated that there would not be any "true bills" or "no-bills" on file with the clerk and that I should understand what that meant. I inferred from her response that the grand jury had not even voted on whether to indict PPGC or any of its employees. I then asked her if either Daleiden or Merritt had been indicted. She replied that she could not yet answer that question but said that the HCDAO would be issuing a press release later that afternoon that would address the outcome of the entire investigation. Mitchell emailed me the press release at 3:30 that afternoon. That was the first that I learned that Daleiden and Merritt had been indicted. Before then, I did not know that they had become targets of the HCDAO investigation.

The motion to quash asserts that I "colluded" with the HCDAO prosecutors (MTQ at 3-4). PPGC and I cooperated with the investigation by producing records, answering questions, making employees available for interviews, and giving prosecutors and law enforcement agents a tour of the PPGC facility so they could see first-hand the array of lawful health services that PPGC provides. I do not know what counsel for Daleiden is implying when they assert that I "colluded" with the HCDAO. If they claim that I violated any law by cooperating with the investigation, that assertion is false. Furthermore, to my knowledge, no HCDAO

prosecutor or law enforcement agent who participated in the investigation violated any law, much less any grand jury confidentialities, in their dealings with me.

This affidavit is true and correct.

Josh Schaffer

SUBSCRIBED AND SWORN TO before me on May 17, 2016.

Notary Public in and for the
STATE OF TEXAS

RAMEY E. O'BRIEN
Notary Public, State of Texas
My Commission Expires
September 17, 2016