

IN RE TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
Relator.

§ IN THE _____
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§
§ DISTRICT COURT
§
§
§ POLK COUNTY, TEXAS

RELATOR’S MOTION FOR PROTECTIVE ORDER

Relator, the Texas Department of Criminal Justice (“TDCJ”), files this Motion for Protective Order in response to a document stylized as a subpoena and purportedly issued by Representative Joe Moody that would require Robert Roberson, a convicted murderer currently in TDCJ custody awaiting execution, to appear for in-person testimony at the Texas Capitol.

INTRODUCTION

On October 11, 2024, the Committee on Criminal Jurisprudence of the Texas House of Representatives (“the Committee”) noticed a hearing for October 16, 2024. The stated purpose was to “hear invited testimony only on . . . [c]riminal procedure related to capital punishment and new science writs under Article 11.073, Code of Criminal Procedure.” Exhibit A [October 16 Notice]. At the conclusion of the October 16, 2024, hearing, the Committee issued a defective subpoena which it then sought to enforce against TDCJ. In eventual litigation, the Supreme Court of Texas merely “assum[ed]” the validity of the Committee’s subpoena and held that, while the Legislature may “as a general matter” issue subpoenas, the subpoena power may not be used to displace the judiciary’s power to decide guilt or innocence or to advocate for a new trial in a “specific case.” *In re Tex. House of Representatives*, No. 24-0884, 2024 WL 4795397, at *4, 6, 8, 12 (Tex. Nov. 15, 2024).

On December 4, 2024, Rep. Moody, acting as counsel for the Committee, contacted TDCJ and undersigned counsel to ask whether TDCJ would voluntarily relinquish custody of Roberson in direct contravention to a final court order remanding Roberson to remain in the custody of TDCJ. Exhibit B [Email Comms]. On December 6, 2024, undersigned counsel responded to Rep. Moody requesting that he: (1) identify any authority for TDCJ to lawfully take the Committee's requested action contrary to a binding criminal judgment; (2) explain why alternative means are insufficient to obtain the requested testimony; (3) clarify the topics on which the Committee intends to question Roberson given the constitutional limits on any subpoena authority; (4) ensure sufficient guardrails would be in place to prevent the Committee from investigating judicially determined issues, given that its investigations must respect the separation of powers; and (5) supply copies of any posted notice of meetings at which the Committee might issue a new subpoena. Rep. Moody did not respond.

Instead, on December 10, 2024, an individual legislator purporting to wield the full Committee's authority issued a second subpoena ("the Subpoena") on behalf of the House of Representatives and the Committee. Exhibit C [Subpoena]. The Subpoena was subsequently served on Roberson on December 16, 2024, at TDCJ's Polunsky Unit, 3872 FM 350, Livingston, Texas, 77351. *Id.* The Subpoena commands Roberson, a convicted murderer currently awaiting execution and held in TDCJ custody at the Polunsky Unit, to appear in-person before the Committee at the Texas Capitol on December 20, 2024. Because the Subpoena is procedurally deficient and overly burdensome, TDCJ hereby moves for protection under Tex. R. Civ. P. 192.6.

ARGUMENT

The Texas Rules of Civil Procedure provide that “any ... person affected” by a subpoena “may move for a protective order under Rule 192.6(b),” which gives this Court discretion to make any order in the interest of justice, including to protect a party from undue burden, unnecessary expense, harassment, or annoyance. TEX. R. CIV. P. 176.6(e), 192.6. Upon seeking protection, “[a] person need not comply with the part of a subpoena from which protection is sought . . . unless ordered to do so by the court.” TEX. R. CIV. P. 176.6(e).¹

TDCJ is affected by the Subpoena and is, therefore, entitled to bring this Motion for Protective Order. Specifically, the Subpoena acknowledges that Roberson is “in the custody of Texas Department of Criminal Justice” while also commanding Roberson to appear in person at the Texas Capitol. Therefore, for Roberson to comply with the Subpoena, TDCJ would have to transport Roberson to Austin under obligations akin to a writ of habeas corpus. Thus, TDCJ has standing to bring this Motion. If, however, the Court determines that TDCJ does not have standing because it is not the object of the subpoena and that it is therefore unenforceable against TDCJ, then TDCJ respectfully requests that the Court make that basis clear in any order of dismissal.

I. The Subpoena Is Procedurally Defective Because It Was Issued in Violation of the House Rules, the Constitution, and the Open Meetings Act.

To issue a valid subpoena, the Committee must comply with applicable House Rules and Texas statutes; here, the Committee has failed in both respects.

The House Rules state that a subpoena by a standing committee may issue only upon being authorized “by a record vote of not less than two-thirds of those present and voting...” 2023 House

¹ Regardless of whether the question presented by this motion is civil or criminal in nature, the same rules apply. *See* TEX. CODE CRIM. P. art. 39.04

Rules Manual (“House Rules”) at Rule 4, Ch. B, § 21.² To make such a record vote, the Committee would have had to hold a public meeting, after providing five days’ notice as required by the House Rules. *Id.* at Rule 4, § 11(c). As far as TDCJ is aware, no such notice was ever posted, and no record vote on the subpoena was recorded prior to its issuance on December 10, 2024. *See generally*, Committee on Criminal Jurisprudence Website.³ In email correspondence before Rep. Moody issued the purported subpoena, counsel for TDCJ specifically requested “copies of posted notices and minutes” for any meeting at which the Committee might issue a new subpoena to Roberson. Rep. Moody never answered the question, presumably because the Committee never noticed or held such a meeting.

Second, in addition to violating House Rules, any purported delegation of the Legislature’s future subpoena power to a single legislator violates the Texas Government Code and the Texas Constitution. Here, one legislator purported to issue a legislative subpoena on behalf of a House Committee: at its public meeting on October 16, 2024, the Committee purported to delegate to Rep. Moody the unbounded authority to seek future process to secure Roberson’s testimony, without the two-thirds in-person vote required by the House Rules formulated under state law. The Government Code gives the “committee” the authority to issue subpoenas. TEX. GOV’T CODE § 301.024. It should be obvious that the decision whether, and how, to exercise that subpoena authority is a matter of discretion. *In re Tex. House*, 2024 WL 4795397, at *12. The Legislature, therefore, may not delegate that discretionary authority in violation of the Constitution. *See, e.g.*, Tex. Atty. Gen. Op. V-0436 (Nov. 20, 1947). Even permissible delegations of legislative authority

² Available at <https://tinyurl.com/yc74azfb> (last visited Dec. 18, 2024).

³ Available at <https://www.house.texas.gov/committees/committee/220#meetings> (last visited Dec. 18, 2024).

must establish “definite guidelines and must prescribe sufficient standards to guide the discretion conferred.” *State v. Rhine*, 255 S.W.3d 745, 751 (Tex. App.—Fort Worth 2008), *aff’d*, 297 S.W.3d 301 (Tex. Crim. App. 2009). The Committee did not do that when it made Rep. Moody king-for-ever with respect to issuing subpoenas to Roberson. Instead, it gave him carte blanche.

Third, even if a House Committee could theoretically delegate unbounded discretion to exercise the sovereign functions of a multi-member body to a single individual, any action taken by Committee with regards to the Subpoena, including its issuance, is voidable as a violation of the Open Meetings Act. *See* TEX. GOV’T CODE §§ 551.0021, 551.041, 551.141. The October 16, 2024, meeting was noticed for the purpose of hearing invited testimony on Article 11.073 of the Code of Criminal Procedure. Exhibit B. At the conclusion of the meeting, however, another member of the Committee, moved to authorize Rep. Moody to “[i]ssue and obtain compliance with process issued to Robert Roberson to provide all relevant testimony and information concerning the committee’s inquiry into relevant criminal procedure matters posted by the committee for **today and future hearings**.” Exhibit D [Oct. 16 Minutes] (emphasis added). Presumably acting on this improperly delegated authority, Rep. Moody issued the subject subpoena and had it served on Roberson. The Committee’s October 11 posting provided the public no reasonable notice that the Committee would grant a single member blanket authority in perpetuity to exercise the government function of the Legislature to issue subpoenas. *Cox Enterprises, Inc. v. Bd. of Trustees of Austin Indep. Sch. Dist.*, 706 S.W.2d 956, 958 (Tex. 1986). And this purported delegation obviated the need to post and hold subsequent open meetings at which the Committee might vote in public, with members present, on whether to issue a second subpoena. Either way, the action taken on October 16 that

purportedly underlies the present subpoena violated the Open Meetings Act, whether by furnishing deficient notice or attempting an end-run around future open meetings obligations.

For these reasons, the Subpoena is invalid, and this Motion for Protective Order should be granted.

II. The Subpoena Would Impose an Undue Burden By Requiring TDCJ to Transport a Death-Row Inmate to the State Capitol.

In addition to the procedural defects connected to the Subpoena's issuance, compliance with the Subpoena would also impose an undue burden and expense on TDCJ. Even under ordinary circumstances, the transportation of inmates outside of a secure correctional facility poses significant safety and security risks to the inmate, correctional staff, and the public. Among other things, an inmate confined to state prison presents an obvious flight risk, efforts to escape and evade apprehension often create physical threats to TDCJ personnel, public bystanders may be caught in cross-fire or a hot pursuit, and a violent offender who escapes even for a short time poses an immediate threat to the public's safety. Exhibit E [Lumpkin Dec.]. Additionally, transportation diverts critical resources away from daily operations, leaving behind vulnerabilities at the correctional facilities.

These risks are amplified in this extraordinary circumstance and no efforts can be undertaken to completely eradicate them. For one thing, the Subpoena commands appearance at a place that is more than 150 miles from where it was served. *Contra* TEX. R. CIV. P. 176.3(a) ("A person may not be required by subpoena to appear or produce document or other things in a court that is more than 150 miles from where the person resides or is served."). Because of the distance, it would take more than three-and-a-half hours to transport Roberson the more than 200 miles from the Polunsky Unit to the Texas Capitol. Exhibit E.

Additionally, the security concerns would not stop after Roberson's arrival at the Texas Capitol. The Texas Capitol is not a courthouse; it does not have a secure holding area to stage Roberson upon arrival. The Texas Capitol must also remain open to members of the public who are allowed to carry firearms. And "[a]nytime an inmate is in close proximity to a firearm, there is a significant increase in danger." Exhibit E. Further, Roberson's case has become highly publicized through these and other proceedings. This, coupled with the already heightened passions surrounding the death penalty, creates a high likelihood that individuals will behave unpredictably and violently in response to Roberson's presence, and increases the threat to Roberson, the officers involved in his escort, and the public at large. To mitigate these risks even slightly, TDCJ would have to devote significantly more human and physical resources to the transportation of this one inmate, at a significantly higher cost than it otherwise would to transport an entire roster of inmates. The impact that would cause on the daily operation and security of the Polunsky Unit and other TDCJ facilities will be significant and affect both correctional staff and other inmates. Exhibit E.

On top of that, Rep. Moody's subpoena purports to require that Roberson "remain in attendance from day to day." This would seemingly require TDCJ to undertake ad hoc overnight arrangements to secure the prisoner and would re-introduce the same risks of transport from the Capitol, to the temporary holding place, and back again for as long as the Committee chooses. Exhibit E.

Because the Subpoena imposes an undue burden and unnecessary expense, this Motion for Protective Order should be granted.

III. The Publicly Stated Purpose of the Subpoena Exceeds Any Permissible Scope and Violates the Separation of Powers Clause.

Although “the legislature’s power to subpoena witnesses to investigate facts that could inform future legislation is beyond question,” that power “is not absolute” and must respect the separation of powers. *In re Tex. House*, 2024 WL 4795397, at *6. While the Committee has stated that its goal of compelling Roberson’s testimony is to assist it in assessing potential amendments to Article 11.073, Code of Criminal Procedure—an otherwise valid legislative purpose—the public record demonstrates that that this asserted legislative purpose is nakedly pretextual. Rather than quizzing a convicted murderer about the intricacies of capital habeas procedure (as opposed to relying on the testimony of “Roberson’s attorneys” or the “wealth of public records” from “decades of litigation,” *id.* at *12), the Committee’s public statements leave little doubt that the true purpose of this invited testimony is to relitigate the question of Roberson’s guilt or innocence. But *that* question that was long ago settled by Texas courts—unless and until the Court of Criminal Appeals, the only court in this state with jurisdiction over a capital habeas defendant’s conviction, sees fit to change that. And “the lawful purpose of the subpoena is to obtain information the committee needs to make better public policy—not to intervene in Roberson’s specific case, which is the function of the other two branches.” *Id.* Our Constitution’s Separation of Powers Clause, Tex. Const. art. II, § 1, forbids a Committee of the Legislature to disturb the work of the state judiciary. And even assuming Rep. Moody even could identify a permissible use of the subpoena, there has been no showing that the testimony of this convicted murderer is somehow necessary.

A. To start, the Legislature has authority to issue subpoenas to secure testimony in accordance with the procedures established in statute and by the Rules of each chamber. But this subpoena power “is not absolute.” *In re Tex. House*, No. 24-0884, 2024 WL 4795397, at *6. A committee’s use of the legislative subpoena power is confined to the purpose of “obtain[ing]

information the committee needs to make better public policy—not to intervene in Roberson’s specific case.” *Id.* at *12. That is because “guilt or innocence” is “the judiciary’s exclusive” province that may not be “effectively usurp[ed] or undermine[d].” *Id.* at *4, 6, 12. And for an inmate like Roberson, re-litigating guilt or innocence and awarding new trials is a judicial task committed exclusively to the Court of Criminal Appeals. *See* TEX. CONST. art. V, § 3(a); TEX. GOV’T CODE § 22.001(a). Even if the Legislature wishes to obtain testimony for a lawful purpose here, it must “show[] that only Roberson has the information sought,” especially considering the “wealth of public records” created by the “decades of litigation over his case.” *Id.* These facts are determinative.

Rep. Moody and the Committee plainly seek to use this subpoena for an impermissible purpose, contrary to the Texas Constitution’s separation of powers. That is demonstrated by both its actions and its words. The Committee seeks to run roughshod over the other branches in its efforts to destroy the rule of law. It has expressly—and repeatedly—stated its purpose for wanting Roberson’s testimony: It wants to relitigate the facts of his case because the Committee believes Roberson is innocent and obtain for him a new trial.⁴ Indeed, one of the Committee members went so far as to engage in *ex parte* communications with a sitting judge of CCA—in clear violation of his ethical duties as a member of the Texas Bar (to say nothing of criminal law prohibitions)—imploping her to change her vote in Roberson’s case. *See generally* Letter from W. Cole to B. Hawthorne, *In re Tex. House of Representatives*, No. 24-0884 (Tex. Oct. 28, 2024). It is not the role of the Legislature to adjudicate offenses; that power resides in the judiciary. Counsel for TDCJ

⁴ *See, e.g.,* NBCDFW, *Lone Star Politics: Oct. 27, 2024*, at 1:08–10:03 (Oct. 27, 2024), <https://tinyurl.com/2m8j9vbw>.

specifically requested that Rep. Moody explain the subjects the Committee intended to cover during any hearing to ensure any use of the subpoena would not transgress the exclusive capital habeas jurisdiction of the Court of Criminal Appeals, the general judicial power to determine guilt and innocence, or the Supreme Court of Texas’s recent pronouncements highlighting these limits of the subpoena power. Rep. Moody elected not to respond. Instead, he and Rep. Leach continued to state publicly that the subpoena is needed to “see and hear” Roberson concerning his guilt or innocence because the Committee is “laser focused on [his] specific case” and obtaining “a new trial” for him.⁵ As one audience member put it, the Committee has effectively made itself “the last court of resort” in this state for every execution, and Rep. Moody assured this “won’t be the last [capital] case” the Committee endeavors to relitigate.⁶

B. Setting aside the question of whether the subpoena has been issued for a lawful purpose, there is no evidence that Roberson’s testimony is necessary. Assuming, despite all public evidence to the contrary, that Rep. Moody really seeks Roberson’s testimony to discuss Article 11.073, rather than Roberson’s guilt or innocence in his specific criminal case, Roberson does not have any unique or personal knowledge of the information the Committee claims to seek and there are numerous other methods of obtaining that information by less-intrusive methods. *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995) (orig. proceeding). In fact, during a recent interview, Rep. Moody demonstrated how unnecessary Roberson’s testimony may be with

⁵ Kayla Guo & Terri Langford, *Texas House Committee Demands that Attorney General Allow Roberson to Testify*, Tex. Trib. (Nov. 26, 2024), <https://www.texastribune.org/2024/11/25/robert-roberson-joe-moody-jeff-leach-texas-death-penalty/>.

⁶ *Id.*

respect to the purported 11.073 justification: “Is he gonna be able to talk about the intricacies of Article 11.073 of the Texas Code of Criminal Procedure? No.”⁷

Finally, several equitable factors tip decisively against the Committee’s unilateral efforts to bring a convicted murder to the seat of our state government, including “the cost and inconvenience of transporting the prisoner” and the “security risk the prisoner presents.” *In re Z.L.T.*, 124 S.W.3d 163, 165(Tex. 2003). As previously discussed, the cost and inconvenience of transporting Roberson are extremely high considering the serious security risks inherent in bringing a death-row inmate to the Texas Capitol. Additionally, Roberson poses a high risk to the public; he has been convicted of capital murder and has a “well-documented violent criminal history.” Exhibit E. Finally, the Committee has refused to meaningfully engage with TDCJ in good faith discussion to explore any potential compromise. Exhibit D.

Therefore, this Motion for Protective Order should be granted because the Committee seeks to expand the scope of the Subpoena beyond that which is permissible.

REQUEST FOR HEARING

The Subpoena and this Motion raise important issues for this Court’s consideration. In deciding whether to grant the relief requested herein, the Court must weigh the evidence before it, both as presented in this Motion and any response thereto, as well as what will be presented to the Court during an evidentiary hearing. Given the gravity of this matter, TDCJ requests the Court set this matter for a hearing. As the undersigned counsel will be out of the country between December 27 and January 6, TDCJ requests that this hearing not be set before January 13, 2025.

⁷ *Id.*

CONCLUSION

For the reasons discussed herein, Relator respectfully requests the Court grant this motion and enter a protective order permanently excusing it from assisting the object of the Subpoena at issue from compliance.

Respectfully submitted.

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ATTORNEYS FOR TDCJ

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2024, a true and correct copy of the foregoing document was sent by electronic delivery to: Rep. Joe Moody (Joe.Moody@house.texas.gov).

/s/ Kimberly Gdula
KIMBERLY GDULA
Chief