



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 22, 2021

The Honorable Joe Gonzales
Bexar County Criminal District Attorney
101 West Nueva
San Antonio, Texas 78205

Opinion No. KP-0357

Re: Jurisdiction of a criminal district attorney to prosecute federal officials who violate criminal provisions of the Election Code (RQ-0376-KP)

Dear Mr. Gonzales:

You ask two questions about the authority of a criminal district attorney to prosecute federal officials in certain circumstances, and whether a jury can convict such individuals in absentia.¹

Determining whether authority exists to prosecute in the circumstances you describe would require multiple factual determinations, but you provide only a rudimentary recitation of the facts and circumstances surrounding the alleged criminal violation. *See* Request Letter at 2. This office does not resolve factual issues in the opinion process, and our response is therefore narrowly focused on the legal functions of the criminal district attorney in Bexar County. *See* Tex. Att’y Gen. Op. Nos. GA-0186 (2004) at 6 (stating that this office does not resolve questions of fact); JC-0020 (1999) at 2 (stating that factual disputes may not be resolved in the opinion process).

As to your second question, article 2.01 of the Code of Criminal Procedure states: “[i]t shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done.” TEX. CODE CRIM. PROC. art. 2.01. This is the mantra of district attorney offices throughout Texas and is often quoted in trainings as a reminder of the core value of a prosecutor. At a fundamental level, a discussion of justice never occurs without mentioning the concept of “fairness.” Both the Texas and federal criminal justice systems are built on principles to provide the opportunity for justice and fairness to prevail. The Court of Criminal Appeals, in *Duggan v. State*, said it best:

¹*See* Letter from Honorable Joe Gonzales, Bexar Cnty. Crim. Dist. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Aug. 19, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0376KP.pdf> (“Request Letter”).

As a trustee of the State's interest in providing fair trials, the prosecutor is obliged to illuminate the court with the truth of the cause, so that the judge and jury may properly render justice. Thus, the prosecutor is more than a mere advocate, but a fiduciary to fundamental principles of fairness.

778 S.W.2d 465, 468 (Tex. Crim. App. 1989).

Inherent in those principles is the requirement that the accused be presented with charges and the opportunity to confront those who made the accusations. The Sixth Amendment to the United States Constitution provides: “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation [and] to be confronted with the witnesses against him” U.S. CONST. amend. VI; *see also* TEX. CODE CRIM. PROC. arts. 1.15 (“Jury in Felony”), 1.25 (“Confronted by Witnesses”), 15.03 (“Magistrate may issue warrant or summons”), 15.07 (“Warrant issued by other magistrate”), 15.16 (“How warrant is executed”), 15.17 (“Duties of Arresting Officer and Magistrate”), 17.01–.49 (“Bail”). These laws of procedure lay out the requirement for the essential piece of Texas’s criminal justice system: a defendant must be brought before a court in person to be confronted with the crimes alleged. In the case of a felony charged or a misdemeanor when the punishment involves imprisonment, a defendant is required to stand before the jury or court and announce his plea of guilt or innocence. Code of Criminal Procedure article 33.03 speaks directly to the question presented here:

In all prosecutions for felonies, the defendant must be personally present at the trial, and he must likewise be present in all cases of misdemeanor when the punishment or any part thereof is imprisonment in jail; provided, however, that in all cases, when the defendant voluntarily absents himself after pleading to the indictment or information, or after the jury has been selected when trial is before a jury, the trial may proceed to its conclusion.

TEX. CODE CRIM. PROC. art. 33.03. *Morrison v. State* further details the necessity of an appearance by the defendant: “although a defendant may waive his Sixth Amendment right to be present in the courtroom virtually any time after a trial commences, under [a]rticle 33.03, an accused’s right to be present at his trial is unwaivable until such a time as the jury has been selected.” 480 S.W.3d 647, 657 (Tex. App.—El Paso 2015, no pet.) (citation and footnote omitted). Without this initial requirement, neither justice nor fairness can be found to follow.

Therefore, whether a criminal district attorney may prosecute an accused for any crime in Texas depends solely on a factual analysis of the existence of probable cause for the violation alleged. After a finding of probable cause, a warrant or capias may issue, and if served on the defendant, the defendant must appear before the court. *See* TEX. CODE CRIM. PROC. art. 14.06(a). Thus, conviction in absentia in the circumstances you describe would not be permitted due to the unwaivable right set forth in article 33.03 of the Code of Criminal Procedure.

S U M M A R Y

Determining whether authority exists to prosecute in any specific situation requires multiple factual determinations, which are outside the scope of the opinion process of this office.

The Sixth Amendment to the U.S. Constitution and article 33.03 of the Code of Criminal Procedure establish a right of the accused to be present in the courtroom through the conclusion of trial proceedings. Under article 33.03, an accused's right to be present at his trial is unwaivable even by the accused until such a time as the jury has been selected.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

KEN PAXTON
Attorney General of Texas

BRENT E. WEBSTER
First Assistant Attorney General

LESLEY FRENCH
Chief of Staff

MURTAZA SUTARWALLA
Deputy Attorney General for Legal Counsel

JOSHUA RENO
Deputy Attorney General for Criminal Justice

VIRGINIA K. HOELSCHER
Chair, Opinion Committee