

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA

v.

KENNETH JOHN CHESEBRO, and
SIDNEY KATHERINE POWELL.

Indictment No.
23SC188947

**ORDER ON MOTION TO INTERVIEW GRAND JURORS AND
TO UNSEAL SPECIAL GRAND JURY TRANSCRIPTS**

On January 24, 2022, the Chief Judge of the Atlanta Judicial Circuit issued an Order authorizing the convening of a special purpose grand jury at the District Attorney's request to investigate "the facts and circumstances relating directly or indirectly to possible attempts to disrupt the lawful administration of the 2020 elections in the State of Georgia." (Petition for Certification of Need, 2022-EX-000024, Ex. B (May 25, 2022); Order Approving Request for Special Purpose Grand Jury, 2022-EX-000024 (Jan. 24, 2022)). After being selected and sworn on May 2, 2022, the special purpose grand jury began receiving evidence on June 1, 2022, submitted its final report on December 15, 2022, and dissolved on January 9, 2023. (Order Entering Special Purpose Grand Jury's Final Report Into Court Record, 2022-EX-000024, Ex. A (Sep. 8, 2023); Order Re: Special Purpose Grand Jury's Final Report, 2022-EX-000024 (Feb. 13, 2023)). Earlier this month, supervising Judge McBurney authorized publication of the final, unredacted report. (*Id.*). At this time, the record is silent as to the extent or manner, if any, that the District Attorney utilized the special purpose grand jury's final report or any other materials while presenting to the regular grand jury that indicted this case. That indictment, returned on August 14, 2023, charged the Defendants as members of a conspiracy to unlawfully influence the 2020 presidential election.

Now, Defendants Chesebro and Powell (by written and oral adoption) have filed motions seeking to interview the grand jurors and obtain materials generated by the special purpose grand

jury. (Chesebro Docs. 12, 13). The Court held a hearing to consider their arguments on September 14, 2023, during which the State submitted supplemental briefing. (Chesebro Docs. 38, 39). Considering the record, law, and arguments of counsel, the Court rules as follows:

Interviews with the Grand Jurors

Citing concerns for the length and complexity of the indictment, Defendants request interviews with any willing former jurors to determine whether the indictment was “properly returned,” specifically whether the indictment was read entirely or merely summarized to the grand jury. (Chesebro Doc. 12 at 1). The State objects, characterizing Defendants’ motion as an attempt to improperly pierce the secrecy of deliberations and “perform an illegal investigation.” (Chesebro Doc. 38 at 7). The proper course appears somewhere in the middle.

The State rightly points out that preservation of grand jury secrecy is a well-settled principle in Georgia.¹ As an initial matter, the Code is clear that grand jury deliberations remain sheltered from outside inquiry. Before serving, all grand jurors swear to “keep deliberations of the grand jury secret unless called upon to give evidence thereof in some court of law in this state,” and any “communications among grand jurors are excluded as evidence on grounds of public policy.” O.C.G.A. §§ 15-12-67 and 15-12-73; *see also* O.C.G.A. § 24-5-501(a)(3) (excluding “[c]ommunications among grand jurors” from evidence); O.C.G.A. § 24-6-606(b) (excluding the use of juror testimony when challenging the validity of an indictment, except in certain circumstances to include “whether any outside influence was improperly brought to bear upon any juror”). These laws, as well as the grand jury’s historical investigative function, have led our appellate courts to consistently keep a grand jury’s work hidden behind the curtain. *See In re Hall Cty. Grand Jury Proceedings*, 175 Ga. App. 349, 352 (1985) (“[P]reservation of the secrecy of

¹ While the State repeatedly references federal authority in its supplemental briefing, consideration of these cases would only complicate the analysis given the differences between federal and state grand juries, and further, Georgia law is sufficiently clear to answer the issues currently presented.

grand jury proceedings is [] a well-recognized principle in Georgia. . . . This ‘indispensable secrecy of grand jury proceedings’ must not be broken[.]”). For example, our courts have summarily and routinely rejected demands for grand jury records. *See Ruffin v. State*, 283 Ga. 87, 88 (2008) (“Grand jury proceedings are confidential and thus appellant was not entitled to a transcript of those proceedings.”); *Ward v. State*, 262 Ga. 293, 299 (1992) (same); *Isaacs v. State*, 259 Ga. 717, 721 (1989) (same); *Thomas v. State*, 331 Ga. App. 641, 656 (2015) (same). Similarly, pleas in abatement challenging the sufficiency of the evidence presented to a grand jury are habitually denied. *See, e.g., Buchanan v. State*, 215 Ga. 791, 793 (1960) (“It has never been the practice in this State to go into an investigation to test the sufficiency of the evidence before the grand jury.”); *Felker v. State*, 252 Ga. 351, 366 (1984) (rejecting challenge to venue evidence); *Evans v. State*, 360 Ga. App. 596, 601 (2021) (“A defendant seeking to quash an indictment has the burden to overcome the presumption that it was returned on legal evidence by showing there was no competent evidence upon which it could lawfully have been returned.”). Maintaining this protection furthers several policy goals, including the encouragement of witness disclosure and uninhibited juror deliberations, and further ensures that grand juries remain an effective investigative tool. *See In re Gwinnett Cty. Grand Jury*, 284 Ga. 510, 513 (2008).

On the other hand, a returned indictment is not omnipotent, and the trial court should dismiss an indictment upon a proper showing. *See, e.g., Colon v. State*, 275 Ga. App. 73, 77 (2005). How might defense counsel establish such an infirmity? In some cases, the defendant may have personally appeared before the grand jury and made observations. *See, e.g., Olsen v. State*, 302 Ga. 288, 289 (2017). The testifying witnesses are also fair game, as “grand jury witnesses are not sworn to secrecy” and are only required to give truthful testimony. *Id.* at 291 n.4; *Summers v. State*, 63 Ga. App. 445, 447 (1940) (witnesses testified at hearing on plea in abatement). As for the grand jurors themselves, the Court has not found nor been provided with any authority that suggests

defense counsel are totally forbidden from contact. *See, e.g., Colon v. State*, 275 Ga. App. 73, 75 (2005) (testimony of a grand jury witness presented to support defendant’s claim). Defense counsel here are entitled, and would be expected, to conduct a thorough investigation in the zealous representation of their clients. Setting aside scenarios involving harassment of some kind, the desire to simply talk to the grand jurors is not “illegal.” *See Olsen v. State*, 302 Ga. 288, 291-94 (2017) (“neither grand jury members, prosecutors, nor grand jury witnesses are bound to secrecy regarding the evidence presented to the grand jury . . . the grand jurors’ oath encompasses only deliberations and not all things occurring in the grand jury room”).

With these principles in mind, the Defendants’ motion is **GRANTED** to the extent that it requests voluntary interviews with the grand jurors. To ensure that privileged matters remain protected and to prevent a recurrence of the previous unauthorized disclosure of the grand jurors’ personal information (Chesebro Doc. 38 at 11-12), the Court will guide and maintain oversight over these interviews: Defense counsel, either individually or in consolidated form, are directed to file a list of proposed grand juror questions within three business days following entry of this Order. The State will then have three business days following the Defendants’ submission(s) to object to any particular question. The Court will file an order listing all approved and rejected questions, and should any question survive, the State must provide contact information for each grand juror *ex parte* and *in camera*. The Court will then independently contact each juror to inquire whether he or she is willing to submit to an interview, either remotely or in-person. Such interviews will be conducted on the record in the presence of the Court and counsel for all parties at a time agreeable to each juror. Should defense counsel believe sufficient grounds and the requisite prejudice exist to dismiss the indictment after the conclusion of the final grand juror interview, Defendants will be permitted an extension from the regular deadline to file additional

particularized motions. *Olsen*, 302 Ga. 288 at 293 (finding indictment may not be dismissed unless the error prejudiced the defendant).

Special Purpose Grand Jury Documents

The Defendants further request a copy of all recordings, transcripts, and interim reports produced by the special purpose grand jury, contending general discovery and due process requirements compel disclosure. (Chesebro Doc. 13 at 1, 3). The State has agreed to produce the transcript of Defendant Cheeley, as this testimony forms the underlying conduct of Count 41 of the indictment. The request for the final report is now **MOOT**. As for the remainder, the Court finds that requiring the disclosure of essentially all records generated by the special purpose grand jury would violate Georgia's long-held public policy affirming grand jury secrecy and is not required by Georgia's Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 *et seq.*

Defendant Chesebro asserts that the previously outlined secrecy provisions are less applicable to special purpose grand juries, but the Court has found no support for this position. As documented in prior litigation surrounding this special purpose grand jury, there is no substantive distinction between the two types of grand juries. Special grand juries are selected by the clerk in the same manner as regular grand juries. O.C.G.A. § 15-12-100(b). They contain the same number of members as a regular grand jury, and the selection process of the foreperson is identical. *Id.*; O.C.G.A. § 15-12-67. While special purpose grand juries may not issue indictments, both types of grand juries issue general presentments. (*See Order Denying Motion to Quash*, 2022-EX-000024 at 3-4 n.3 (August 29, 2022) (“General presentments are, in both form and substance, reports of grand jury investigations.”)). Even if the special purpose grand jury is considered civil in nature, a notion supervising Judge McBurney already convincingly debunked, “[t]here is no statutory distinction drawn between the criminal accusatory and civil investigative roles of the grand jury with regard to the requirement that secrecy be maintained.” *In re Gwinnett Cty. Grand Jury*, 284

Ga. 510, 513 (2008); (Order Denying Motion to Quash, 2022-EX-000024 at 5 (August 29, 2022) (“Put simply, there is nothing about this special purpose grand jury that involves or implicates civil practice.”)). Regardless of its form, our Supreme Court has recognized that all grand juries require secrecy and protection from certain disclosures.

Additionally of note when considering the transcripts and recordings of witness testimony, the charter for this special purpose grand jury provided that “the provisions of O.C.G.A. § 15-12-83 shall apply.” (Order Approving Request for Special Purpose Grand Jury, 2022-EX-000024 (Jan. 24, 2022)). The referenced statute specifically deals with recordings and court reporter materials:

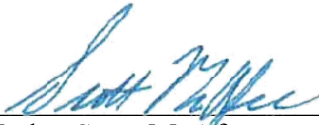
[A] recording, any court reporter’s notes, and any transcript prepared from such recording or notes shall be provided solely to the district attorney, who shall retain control of such recording, notes, and transcript. The district attorney may use such materials to the extent such use is appropriate to the proper performance of his or her official duties, including compliance with Article 1 of Chapter 16 of Title 17 [Discovery in Felony Cases].

O.C.G.A. § 15-12-83. These materials are the property of the District Attorney, not the Court, to do with as she sees fit. (*See, e.g.*, Order Re: Special Purpose Grand Jury’s Final Report, 2022-EX-000024 at 2-3 (Feb. 13, 2023) (“The final report, as the District Attorney argued, was ultimately destined for her, not the Court. It will inform her investigative decision-making process, not the Court’s. . . . All three documents - report, application, and affidavit - are parts of criminal investigative processes, not court proceedings.”)). The Defendants’ motion to turn over all records generated by the special purpose grand jury is therefore **DENIED**.

However, as contemplated by O.C.G.A. § 15-12-83, discovery and due process obligations cannot be ignored, and at the motions hearing, the State agreed to turn over the transcripts of any witness it intends to call in post-indictment proceedings. To ensure the efficient presentation of evidence at any pretrial evidentiary hearings and at trial, under the authority of O.C.G.A. § 17-16-7 (“Statements of witnesses”), the Court **ORDERS** that any recording or transcript in the

possession of the State of any witness that testified before the special purpose grand jury be turned over to the Defendants at the time the State, in good-faith, decides to call that individual at any pretrial hearing, or at the time the State adds the individual to its list of witnesses pursuant to O.C.G.A. § 17-16-8, whichever occurs earlier. In addition, although there is no indication that the State intended to do otherwise, the State is further directed to continually review the special purpose grand jury materials and make any disclosures as required by *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny.

SO ORDERED, this 19th day of September, 2023.



Judge Scott McAfee
Superior Court of Fulton County
Atlanta Judicial Circuit