

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

STATE OF GEORGIA

v.

KENNETH JOHN CHESEBRO

Indictment No.
23SC188947

ORDER ON DEFENDANT’S MOTION TO EXCLUDE COMMUNICATIONS

On October 10, 2023, the Court held a hearing concerning Defendant’s motion filed September 20, 2023, seeking exclusion of any memoranda and emails written by the Defendant in furtherance of campaign legal strategy. (Doc. 56). The Defendant argued that these communications are protected by attorney-client privilege and the work product doctrine due to their creation through his role as a lawyer for then-President Trump’s 2020 presidential campaign. *See* O.C.G.A. § 24-5-501(a)(2) (“Certain communications privileged”). After considering arguments, the briefs, the record, and the applicable law, the Court determines that the communications are admissible and DENIES the motion.

The documents which the Defendant seeks to exclude are the focal point of the charges against him: (1) the November 18, 2020, memorandum to campaign lawyer Jim Troupis promoting a plan in which electors would cast votes for co-Defendant Donald Trump on December 14, 2020; (2) the December 9, 2020, memorandum to co-Defendant David Shafer and others laying out details of the presidential elector plan in six states; (3) the December 13, 2020, email to co-Defendants Rudolph Giuliani and John Eastman contemplating a departure from the Electoral Count Act and advocating the “President of the Senate strategy”; and (4) the January 1, 2021, email sent to Eastman and campaign attorney Boris Epshteyn outlining a plan to delay the joint session of Congress on the day for counting elector votes. These communications are detailed in the indictment under Acts 39, 46, 124, and 109 in violation of O.C.G.A. § 16-14-4

(RICO) and conspiring to commit impersonation of a public officer, forgery, false statements and writings, and filing false documents.

The State argues that the documents are neither privileged nor protected work product because the Defendant failed to demonstrate the existence of an attorney-client relationship or the procurement of legal advice in anticipation of litigation. (Doc. 106). As the party asserting the attorney-client privilege, the Defendant has the burden to establish its applicability. *Zielinski v. Clorox Co.*, 270 Ga. 38, 40 (1998). In response, the Defendant asserts that he established an attorney-client relationship when he drafted memoranda summarizing legal findings and opinions during pending litigation at the request of a campaign attorney.¹ The Court also notes that it is in the awkward position of determining whether widely disseminated documents should be protected from disclosure as a matter of law.² In the event the communications were leaked by the campaign, the privilege is waived.³ Furthermore, an *in camera* inspection appears to serve no purpose when the documents are already possessed by both parties and in the public arena. But setting aside these more convoluted questions of whether the Defendant has established an attorney-client relationship or the existence of a waiver, the Court reaches the conclusion that the documents are not privileged because they fall within the crime-fraud exception.

The attorney-client privilege does not extend to communications concerning proposed infractions of the law in the commission of a crime or the perpetration of a fraud. *Atlanta Coca-*

¹ In support of this assertion, defense counsel submitted post-hearing documents *in camera*.

² Several communications have long been published by news media outlets and more recently to the public case docket.

³ In Georgia, where the record does not demonstrate how a party obtained the evidence, the privilege which belongs to the client, not the lawyer, is not deemed waived. *Bethune v. Bethune*, 363 Ga. App. 273, 278 (2022); *see Rouse v. State*, 275 Ga. 605 (2002) (tape-recorded interview was privileged because the record did not establish how a party obtained it); *but see Eastman v. Thompson*, 594 F. Supp. 3d 1156, 1187 & n.193 (C.D. Cal. 2022) (protection was waived because the November 18, 2020, memorandum was presumably disclosed to the news media).

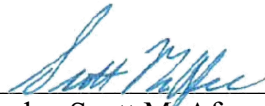
Cola Bottling Co., 50 Ga. App. 637, 639 (1935). To overcome a claim of privilege, proof of the existence of a crime or fraud is not required; rather, “[t]here must be something to give colour to the charge,” and the State need only present prima facie evidence that the charges have “some foundation in fact.” *Id.* at 639; *In re Hall Cty. Grand Jury Proceedings*, 175 Ga. App. 349, 352 (1985) (“The government is not required to prove the existence of a crime or fraud in order to overcome a claim of privilege.”). Prima facie evidence is on its face “good and sufficient to establish a given fact, though it can ultimately be rebutted or contradicted.” *Rose v. Commercial Factors of Atlanta, Inc.*, 262 Ga. App. 528, 529-30 (2003); compare *Sullivan v. State*, 327 Ga. App. 815, 818-19 (2014) (conversations relating to a plan to induce a victim to drop charges fell within the ambit of the crime-fraud exception), with *Pihlman v. State*, 292 Ga. App. 612, 616 (2008) (testimony protected by the attorney-client privilege where no evidence of fraud or crime existed, and the argument that perjury was committed was merely speculative).

A review of the State’s post-hearing submission,⁴ and without consideration of the materials Defendant contends are privileged, reveals that a prima facie case has been made that the conspiracy charges have “some foundation in fact” and the communications are subject to the crime-fraud exception. *Atlanta Coca-Cola Bottling Co. v. Goss*, 50 Ga. App. at 639. As our courts have discerned, “[t]he privileged communication may be a shield of defense as to crimes already committed,” but it cannot be used “as a sword or weapon of offense to enable persons to carry out contemplated crimes against society, [or] frauds[.]” *In re Hall Cty. Grand Jury Proceedings*, 175 Ga. App. 349, 350 (1985). The State having met its low burden of showing that the charges have “some foundation in fact,” the undersigned concludes that the communications fall within the crime-fraud exception and are neither protected work product nor

⁴ To be filed subsequently under seal along with the Defendant’s submissions.

privileged.⁵ *Atlanta Coca-Cola Bottling Co. v. Goss*, 50 Ga. App. 637, 639 (1935). The motion is DENIED.

SO ORDERED, this 18th day of October, 2023.



Judge Scott McAfee
Superior Court of Fulton County
Atlanta Judicial Circuit

⁵ Because the State indicated that it does not have an authenticated copy of the December 6, 2020, memorandum, nor has the Defendant stipulated to its authenticity, the Court defers ruling on this document. (Doc. 106 at 3).