FULTON COUNTY SUPERIOR COURT
STATE OF GEORGIA

STATE OF GEORGIA,	
V.	INDICTMENT NO. 23SC188947
KENNETH CHESEBRO, DEFENDANT.	JUDGE MCAFEE

Response to State's Motion Requesting the Court to Advise Defendants of the Effects of Filing a Speedy Trial Demand

COMES NOW, Kenneth Chesebro, by and through the undersigned Counsel, and files this response to the State's August 30, 2023 motion, which attempts to convince this Court that the State need not fully comply with its statutory discovery obligations, apparently as a punishment for Mr. Chesebro exercising his statutory right to a speedy trial. In support thereof, Defendant shows this Court the following:

Background

Defendant agrees with the State with regard to the procedural history of the case. When the State requested undersigned Counsel to provide an electronic storage device for the State to load discovery on it, undersigned Counsel did so the very next day, August 25, 2023. The State advised that the discovery would be served on the provided hard drive on or about September 15, 2023. It is clear, however, the State has the discovery now and can disclose it with minimal effort. The State said that it is acting "in the spirit of good faith" by beginning the process of supplying Defendant with responses to his discovery requests. However, that is not acting in good faith; that is acting in according with the law that the State must follow. Put simply, the District

Attorney cannot attempt to claim credit for doing nothing more than the law requires her to do.

Despite Counsel being told that the discovery was ready to distribute, and despite Counsel providing the District Attorney's Office with a hard drive for upload of said discovery, the State now contends that it is not possible to turn over discovery before September 15, 2023. Instead of simply turning over the discovery that is currently (and has long been) in the State's possession, the State has instead spent its time ignoring Counsel's inquiries about discovery compliance, and is now taking the time to file a motion that turns Georgia case law on its head.

Discussion

On August 30, 2023, the State filed a motion for this Court to advise Mr. Chesebro of the effects of filing a speedy trial demand. In response to Mr. Chesebro's Statutory Demand for Speedy Trial, the State responded with the unusual position that because Mr. Chesebro exercised his statutory right to a speedy trial, he somehow waived his statutory right to discovery, as afforded and protected by O.C.G.A. § 17-16-4. The discovery statute carves out ***no*** exception for the State to avoid compliance if a speedy trial is sought. The State now argues that Mr. Chesebro's decision to file a statutory speedy trial demand limits his options. That is simply wrong.

The State attempted to support its absurd assertion by erroneously citing *Smith v. State,* 257 Ga. App. 88, 90 (2002), and *Ruff v. State,* 266 Ga. App. 694, 695 (2004). However, these cases, and no case in Georgia history, support the State's proposition that a defendant's "decision to file a speedy trial demand limits certain of [his] options

in this case, namely: 1) The Defendant[] cannot now argue that [he] is entitled to the State's discovery responses ten (10) days in advance of trial." *See* State's Mot. at 2.

In *Smith v. State*, a speedy trial demand was filed and the case was called at the trial calendar. 257 Ga. App. at 90. Defense counsel moved to withdraw his speedy and requested a continuance because he was not provided with the videos of the victim's statements (because the videos were not timely provided—to which the State argued prior to turning them over, it had made them available via its open file policy). *Id.* The trial court denied the motion to continue, and the Georgia Court of Appeals found no abuse of discretion because defense counsel had at least six days to review the videos, there was no demonstration on how additional time would help prepare, and the defendant could not show harm. *Id.* at 90–91. While the Court of Appeals did not find any discovery violations, the Court absolutely did ***not*** hold that a defendant waives his statutory right to timely discovery if he files a speedy trial demand.

In *Ruff v. State*, a speedy trial demand was filed and a trial was scheduled a mere two weeks later. 266 Ga. App. at 695. At the start of trial, the defendant moved to exclude the testimony of any witnesses not on the witness list provided by the State in accordance with O.C.G.A. § 17-16-21. *Id.* The trial court offered the defendant a continuance to prepare for the witnesses and also still be tried within the statutory speedy trial requirements. *Id.* The defendant did not want to ask for a continuance and said he was ready for trial. *Id.* The Georgia Court of Appeals held that the trial court did not abuse its discretion because the defendant did not request a continuance. The Court

of Appeals again did ***not*** hold that defendants waive the statutory right to discovery if a speedy trial demand is filed.

In *Higuera-Hernandez v. State*, 289 Ga. 553 (2011), the facts are as follow:

> In early January 2010, when Appellant was first arraigned, the trial court gave defense counsel a date in early August 2010 when the case would appear on a case management calendar in order to ensure that all discovery was provided in a timely manner and that no other issue would prevent the case from proceeding to trial. However, Appellant filed a demand for speedy trial on January 27, 2010 and was informed on February 25, 2010 that discovery materials were then available and had been mailed to defense counsel. On Monday, March 1, 2010, the case was placed on the two-hour call, and defense counsel was handed 46 discs containing all discovery materials. Appellant's attorney was released from the two-hour call on March 3 and told to report for trial five days later on March 8. On March 4, Appellant filed a motion for a ten-day continuance and a motion *in limine* to exclude any and all evidence not supplied to his counsel within ten days prior to trial as required by O.C.G.A. § 17–16–4. *See* O.C.G.A. § 17–16–6. On March 8, defense counsel told the trial court that she could not open seven of the discs even after receiving replacements. The trial court explained, month by month and week by week, that its calendar was full of civil and criminal trials and hearings through the month of June, the last day of which was the deadline for compliance with the speedy trial demand. . . . [T]he trial court heard in some detail what discovery material defense counsel had been able to review and stated that it would consider any specific evidence that defense counsel brought to its attention during trial as appropriate for exclusion due to the timing of discovery.

289 Ga. 553, 558–59 (2011). The Georgia Supreme Court found that, under those circumstances,

> the trial court did not abuse its broad discretion under O.C.G.A. § 17–16–6 by denying a continuance and refusing the harsh remedy of evidence exclusion for the untimeliness of discovery. Instead, the court used its judgment to fashion

> a remedy appropriate to a case in which there was a speedy trial demand and ***no other reasonable time*** to proceed with the rather lengthy trial within the constraints of that demand.

Id. at 559 (emphasis added) (internal citations omitted).

The discovery statute is black letter law. Discovery must be provided 10 days before trial. O.C.G.A. § 17-16-4(a)(1).[1] Just three months ago our Supreme Court reminded criminal practitioners in *Blalock v. State*, 316 Ga. 330, 336 n.6 (2023), that the 10-day rule to provide discovery applies regardless of whether a statutory speedy trial demand is in play. In *Blalock*, the defendant filed a speedy trial demand. *Id*. at 335. Thirteen days before trial the defendant was provided substantial discovery (to include 37 compact disks of evidence). *Id*. at 335–36. The defendant moved to exclude the discovery stating that the State waited until the last minute to provide discovery, to which "[t]he prosecutor asserted that the State's discovery [compliance] was 'timely' and 'in excess' of the ten days required by statute, having been turned over 13 days before trial." *Id.* at 336. The Defense then moved for a continuance which the trial court denied. *Id*. The Supreme Court found no clear abuse of discretion in the continuance denial, noting that the trial court had determined that the 10-day rule applied and that it was complied with by the State. *Id*. at 339.

The State said that these cases show that Georgia appellate courts approve of trial judges providing defendants with two options: (1) go to trial without a review of discovery or (2) waive the speedy trial demand and seek a continuance. State's Mot. at 4. This is not an accurate summation of the case law. None of the cases from the

[1] "The Court may specify the time, place, and manner of making the discovery, inspection, and interview and may prescribe such terms and conditions as are just." O.C.G.A. § 17-16-6.

higher courts force a defendant to go to trial without reviewing discovery. Nor do any of the cases say that the State can ignore its obligations to comply with the discovery statute if a defendant exercises his right to file a speedy trial demand. The State cannot sit back with its hands crossed and not provide discovery in hopes that Defendant will seek a continuance. The State must continue to provide discovery that is in its possession in a timely fashion.

At no point ever has a court of law in Georgia held that the loss of one's statutory discovery rights is an unfortunate consequence of exercising one's statutory right to a speedy trial.

With regard to a defendant waiving the 10-day notice on similar transaction evidence if the defendant files a demand for speedy trial, that is also false. *See* State's Mot. at 5. A defendant ***never*** waives his statutory rights to discovery. The State still has a continuing duty to disclose the evidence it has. While a trial court may use its discretion to deny excluding the evidence that is provided after the 10-day deadline has run, that does not mean the State is discharged from its duties to adhere to the 10-day rule. In other words, just because a trial court has the authority to make an exception for the State's failure to abide by the discovery rules does not mean that the State can break the rules whenever it wants.

In support of its incorrect assertion, the State cites *Brown v. State*, 275 Ga. App. 281, 287 (2005), where the State provided notice six days before trial and three days before trial. *See* State's Mot. at 5. In *Brown*, the Court of Appeals said the trial court did not abuse its discretion by shortening the time for notice compliance due to the

demands placed on the trial court. 275 Ga. App. at 287. The Court of Appeals did ***not*** say that the State was not required to provide any notice at all. Nor did say that a defendant waives this right-to-notice by filing a demand for speedy trial.

Rather disingenuously, the State is also asking this Court to exclude any evidence that Defendant does not timely provide by statute.[2] *See* State's Mot. at 10. It seems the State wants to have its cake and eat it too. How can the State credibly write a motion—with citations to cases that do not hold what the State is suggesting—asking this Court to advise Mr. Chesebro that he has waived his statutory discovery rights because he also took advantage of his other statutory right to a speedy trial? And how can the State, with a straight face, then ask the Court to hold Mr. Chesebro to the time limitations of the discovery statute? Put bluntly, the State's suggestions and misapplication of legal precedent are borderline sanctionable.

The Court should order the State to continue to comply with the discovery statute in a timely manner. The State should not just be allowed to sit on its thumbs to run down the clock, as late as possible, to gain a tactical advantage in this litigation.[3] To allow otherwise would let the State skirt Georgia law and usurp the power to decide when and if they choose to meet their statutory obligations without fear of any consequence from the Court.[4]

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[2] Defendant will abide by and comply with the discovery statute time limitations.

[3] The State has worked on this case for approximately two years. The State has apparently reviewed all the evidence and stored said evidence in a workable manner. The State has publicly trumpeted that it is ready to go to trial immediately. Therefore, to now say the State can't turn over discovery strains credulity.

[4] Again, the State already advised Counsel for the defendants in this case that it has discovery and is ready to provide it on or about September 15, 2023. Why then is the State filing this

Respectfully submitted this 31st day of August 2023.

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frivolous motion arguing about a point that does not need to be argued? Just provide the discovery.

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Certificate of Service

I hereby certify that I have this day served a copy of the within and foregoing *Response to State's Motion Requesting the Court to Advise Defendants of the Effects of Filing a Speedy Trial Demand* upon the following counsel for the State of Georgia via e-mail and the e-filing system:

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This 31st day of August 2023.

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