

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

v.

DONALD JOHN TRUMP,
RUDOLPH WILLIAM LOUIS GIULIANI,
JOHN CHARLES EASTMAN,
MARK RANDALL MEADOWS,
KENNETH JOHN CHESEBRO,
JEFFREY BOSSERT CLARK,
JENNA LYNN ELLIS,
RAY STALLINGS SMITH III,
ROBERT DAVID CHEELEY,
MICHAEL A. ROMAN,
DAVID JAMES SHAFER,
SHAWN MICAH TRESHER STILL,
STEPHEN CLIFFGARD LEE,
HARRISON WILLIAM PRESCOTT FLOYD,
TREVIAN C. KUTTI,
SIDNEY KATHERINE POWELL,
CATHLEEN ALSTON LATHAM,
SCOTT GRAHAM HALL,
MISTY HAMPTON a/k/a EMILY MISTY HAYES
Defendants.

CASE NO.

23SC188947

**STATE'S RESPONSE IN OPPOSITION TO DEFENDANT CHESEBRO'S MOTION TO
UNSEAL SPECIAL GRAND JURY TRANSCRIPTS, RECORDINGS AND REPORT(S)**

COMES NOW, the State of Georgia, by and through the District Attorney FANI T. WILLIS, and submits this response to Defendant Chesebro's motion to unseal special grand jury transcripts, recordings and report(s).

1. Introduction

Pursuant to Georgia law, the State intends to turn over, in accordance with its legal and ethical obligations, a list of unindicted of co-conspirators, and the transcript of defendant Cheeley's

testimony to the Special Purpose Grand Jury (“SPGJ”). Further, the State notes that the final report of the SPGJ has been released, and his claims to release the final report are now moot.

To protect the unindicted co-conspirators, the State did not name the unindicted co-conspirators in the indictment, because the practice of naming the unindicted co-conspirators in the indictment has been severely criticized. *United States v. Biggs*, 514 F.2d 794 (5th Cir. 1973). As defendant has asked for the list of unindicted co-conspirators to prepare in his defense, the State will turn the list over to defendants and will request this Court to issue a protective order to temper its public impact. *Id.* at 805.

Count 41 of the indictment charges defendant Cheeley with perjury to the SPGJ. The transcript of defendant Cheeley’s testimony is central to proving that defendant Cheeley knowingly, willfully, and unlawfully made false statements to the SPGJ. Perjury occurs when “[a] person to whom a lawful oath or affirmation has been administered . . . in a judicial proceeding, . . . knowingly and willfully makes a false statement material to the issue or point in question.” O.C.G.A. 16-10-70 (a). The transcript is best proof of defendant Cheeley’s perjured statements before the SPGJ and will be turned over as discoverable material. *See Walker v. State*, 314 Ga. App. 714, 718, 725 S.E.2d 771, 776 (2012) (a transcript can be used to prove a perjured statement).

2. The grand jury transcripts and records are unavailable to criminal defendants.

As to the underlying transcripts of witness testimony and records of the SPGJ, defendant Chesebro’s request for these materials as general discovery is unavailing. Longstanding and unquestioned authority indicates that grand jury materials, including transcripts and records, are not available to criminal defendants because grand jury proceedings are considered to be confidential. *Stinski v. State*, 286 Ga. 839, 842, 691 S.E.2d 854 (2010); *Ruffin v. State*, 283 Ga. 87, 88, 656 S.E.2d 140 (2008); *Isaacs v. State*, 259 Ga. 717, 721, 386 S.E.2d 316, (1989). In *Stinski*,

the Georgia Supreme Court confirmed that the State complied with its discovery obligations and that the defendant had no entitlement to grand jury transcripts. 286 Ga. at 842. Further, even though a report can be disclosed, the underlying evidence, including records and transcripts, remains confidential. *In re Gwinnett Cty. Grand Jury*, 284 Ga. 510, 513, 668 S.E.2d 682 (2008) (noting that “the requirement that secrecy be maintained” among all types of grand juries without distinction). *Olsen v. State*, 302 Ga. 288, 806 S.E.2d 556 (2017), on which defendant Chesebro relies, does not apply here because it merely considered which employees of a District Attorney may be present during grand jury proceedings, not whether evidence gathered or records created during grand jury proceedings may be released at some later date. The Georgia Supreme Court in *Olsen* recognized that policy considerations for the secrecy of grand jury proceedings should remain a priority for prosecutors in conducting grand jury proceedings. 302 Ga. at 292.

By statute, any grand jury transcripts are placed in control of the District Attorney. O.C.G.A. § 15-12-83 (f) provides that “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 statute further states that the District Attorney may use these materials in performance of her duties, including compliance with the discovery statutes. *Id.* However, as discussed above, there is no authority that demonstrates a criminal defendant is entitled to grand jury transcripts. *Stinski*, 286 Ga. at 842. Instead, authority indicates only specific and extremely narrow exceptions to this longstanding rule. For example, the State recognizes that defendant Cheeley’s testimony to the special purpose grand jury forms the basis of Count 41, and a transcript will consequently be included in discovery. *See Walker v. State*, 314 Ga. App. 714, 718, 725 S.E.2d 771, 776 (2012) (a transcript can be used to prove a perjured statement). The United States Supreme Court deemed that disclosure of grand jury transcripts is appropriate when

“the need for it outweighs the public interest in secrecy, and that the burden of demonstrating this balance rests upon the private party seeking disclosure.” *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 223 (1979). Defendant has not shown that the need for the SPGJ transcripts outweighs the public interest in keeping them classified.

3. Public policy disfavors the release of grand jury transcripts.

Public policy concerns have long backed the need for secrecy of the SPGJ and the defense has pointed to no controlling precedential authority that would override the policy favoring secrecy. The Georgia Supreme Court observed:

The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow. This “indispensable secrecy of grand jury proceedings,” must not be broken except where there is a compelling necessity.

(punctuation omitted) *Kesler v. State*, 249 Ga. 462, 474, 291 S.E.2d 497 (1982) (quoting *United States v. Johnson*, 319 U.S. 503, 513 (1943); *United States v. Procter & Gamble*, 356 U.S. 677, 682 (1958)). See “Grand jury secrecy is older than our Nation itself.” (punctuation omitted) Robert J. Rhee, *In Partial Praise of Boyd: The Grand Jury as Catalyst for Fourth Amendment Change*, 29 Ariz. St. L.J. 805, 846 n. 266 (for a quick overview of the reasons for grand jury secrecy). See *In re Gwinnet Cty, Grand Jury*, 284 Ga. at 513 (“Throughout colonial times, grand jury secrecy was an important part of grand jury proceedings, with violation of the grand jurors' oath of secrecy punishable as contempt and as a crime.”). The Georgia Supreme Court has also recognized that secrecy of grand jury proceedings promotes witnesses being free to disclose alleged crimes and offenses. *Anderson v. State*, 258 Ga. 70, 72-73, 365 S.E.2d 421 (1988). Additionally, the state has an interest in the confidentiality of “information,” including grand jury information, that is “the [s]tate's own creation.” *Henry v. AG*, 45 F.4th 1272, 1284 (11th Cir. 2022) (quoting *Butterworth v. Smith*, 494 U.S. 624, 636 (1990) (Scalia, J., concurring)).

The United States Supreme Court has identified five distinct interests served by keeping proceedings confidential:

First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Douglas Oil Co., 411 U.S. at 219. Any disclosure must be balanced by the public interest in secrecy. *Id.* Further, a particularized need must be shown to break the secrecy of the grand jury. *Procter & Gamble*, 356 U.S. at 682. Defendant has pointed to no compelling necessity that would override established principles of grand jury secrecy.

4. Defendant identifies no compelling necessity to directly release the grand jury transcripts and records.

Again, the State notes that defendant Chesebro has pointed to no compelling necessity other than general discovery principles to release the SPGJ recordings and transcripts, much less binding precedent requiring release. Should any transcript or recording become discoverable for a lawful reason, the State will turn it over as part of its legal obligations.¹ However, if this Court deems that the grand jury materials could be released, the State requests for the grand jury materials

¹ Defendant Chesebro has presented no binding or pervasive statutory or decisional authority to substantiate his claims for relief. To the contrary, none of the inapposite arguments defendant Chesebro advances are meritorious. That said the State is aware that the statutory requirements under O.C.G.A. § 17-16-7 may impact this Court's analysis. The State has not located – and the defense has not advanced - any authority to demonstrate Georgia discovery statutes override Georgia jury secrecy provision. As such, the State maintains its position in this brief but provides the foregoing pursuant to its duty of candor to the court. *See, e.g.* O.C.G.A. § 15-19-4, Ga. R. & Regs. St. Bar. 3.3. As stated below, the State opposes the release of anymore transcripts and records made during the operation of the Special Purpose Grand Jury (“SPGJ”).

be submitted to this Court for an in camera inspection prior to their release and allow the State to file any objections prior to any release. *In re Hall Cty. Grand Jury Proceedings*, 175 Ga. App. 349, 352, 333 S.E.2d 389 (1985) (finding no error in conducting an in camera inspection of grand jury materials for privilege review).

CONCLUSION

The State requests this Court deny Defendant Chesebro's motion to release the SPGJ's transcripts and records.

Respectfully submitted this 14th day of September 2023,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this STATE'S RESPONSE IN OPPOSITION TO DEFENDANT CHESEBRO'S MOTION TO UNSEAL SPECIAL GRAND JURY TRANSCRIPTS, RECORDINGS AND REPORT(S), upon all counsel who have entered appearances as counsel of record in this matter via the Fulton County e-filing system.

This 14th day of September 2023,

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