Fulton County Superior Court
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FULTON COUNTY SUPERIOR COURT
STATE OF GEORGIA

STATE OF GEORGIA, V. KENNETH CHESEBRO ET AL., DEFENDANTS.	CASE NO. 23SC188947 JUDGE MCAFEE

MOTION TO EXCLUDE ANY LEGAL MEMORANDA AND AFFILIATED CORRESPONDENCE UNDER O.C.G.A. § 24-5-501

COMES NOW, Kenneth Chesebro, by and through undersigned counsel, and asks this Honorable Court to exclude any legal memoranda and correspondence between Mr. Chesebro and those affiliated with his client, the Trump Campaign.[1] In support thereof, Mr. Chesebro shows this Court as follows:

PROPOSED FINDINGS OF FACT

Mr. Chesebro, while a practicing lawyer in good standing with the Bar,[2] wrote at least five privileged legal memoranda and e-mails on behalf of the Trump Campaign which it appears the State may seek to introduce into evidence. Four are specifically relied on in the indictment, dated November 18, 2020 (Act 39); December 9, 2020 (Act 46); December 13, 2020 (Acts 79 & 124); and January 1, 2021 (Act 109). A fifth, dated December 6, 2020, has been widely discussed in the press. On their face, they are

[1] This includes any attorney work-product and communications between counsel.

[2] Mr. Chesebro earned his first bar license in October 1987 (Texas). He is also currently licensed in New York, California (currently inactive status), Florida (currently inactive status), Illinois (currently inactive status), New Jersey (currently inactive status). He was licensed in Massachusetts through June 2023 (license voluntarily retired). At all times during the misconduct alleged in the indictment, Mr. Chesebro was an active member of the Bar in good standing.

privileged communications between lawyers representing a client, addressing matters bearing on strategy relating to litigation which was then pending or was anticipated. To the best of undersigned's knowledge, at no point has the Trump Campaign or Mr. Chesebro waived the attorney-client privilege or work-product protection as to these memoranda and e-mails.[3]

Unrelated to Mr. Chesebro, another attorney for the Trump Campaign, John Eastman, was ordered by a California federal court to release the November 18, 2020, memorandum drafted by Mr. Chesebro due to it already being leaked to the media. Eastman v. Thompson, 594 F. Supp. 3d 1156, 1187 & n.193 (C.D. Cal. 2022).[4] That litigation involved Eastman's effort to enforce the attorney–client privilege as it applied to a host of documents in his possession, to resolve whether they needed to be turned over to the January 6th Committee. Id. at 1175. The documents at issue included Mr. Chesebro's November 18 memorandum to the Trump Campaign.

As it pertained to the December 13 e-mail, the federal court found:

> One of the twenty-two documents relating to the Electoral Count Act plan presents a much closer question on anticipation of litigation. In this email, a colleague forwards to Dr. Eastman a memo they wrote for one of President Trump's attorneys. The memo sketches a series of events for the days leading up to and following January 6, if Vice President Pence were to delay counting or reject electoral votes. The memo clearly contemplates and plans for litigation: it maps out potential Supreme Court suits and the impact of different

[3] At the direction of his client, Mr. Chesebro has consistently asserted the attorney-client privilege and work-product provision over these documents (January 6 Committee interview, Fulton County Grand Jury proceedings, etc.). Other documents written by Mr. Chesebro referenced in the indictment, exchanged between Mr. Chesebro and various persons in several States, are not addressed in this motion.

[4] Mr. Chesebro's memos and e-mails dated Dec. 6 and 9, 2020, and Jan. 1, 2021, were not addressed in that litigation

> judicial outcomes. While this memo was created for both political and litigation purposes, it substantively engages with potential litigation and its consequences for President Trump. The memo likely would have been written substantially differently had the author not expected litigation. The Court therefore finds that this document was created in anticipation of litigation.

Id. at 1183–84 (emphasis added) (internal footnotes omitted).

In other words, the federal court clearly found that the December 13 e-mail was a legal memorandum presumptively protected under the attorney-client privilege and the work-product doctrine. The sole basis for the court's finding that the crime-fraud exception was met was not any evidence extrinsic to the document tending to suggest that the advice was sought by the client as part of any plan to commit a crime or fraud. Rather, the court based its holding on the content of the e-mail itself: it having laid out a case that the Electoral Count Act of 1887 was unconstitutional, and that the Trump Campaign could obtain more time to win pending litigation if the President of the Senate took steps on January 6 to set up a test case by which the Supreme Court could resolve questions that had long lingered concerning the constitutionality of the Act. Evidently, the court was of the view that it constituted a crime or fraud for an attorney to suggest that aspects of the Act which scholars had concluded are unconstitutional (as summarized in the e-mail) should be disregarded by the President of the Senate on January 6, for the purpose of triggering a test case by which the Supreme Court could resolve the issue. Id. at 1196-97 ("The draft memo pushed a strategy that knowingly violated the Electoral Count Act").

The California federal court also considered a privilege claim relating to the memorandum of November 18, 2020. The court first held that this memo was "obviously prepared for litigation," id. at 1182 & n.136, and thus was "protected work product." Id. at

1187 & n.185. The Court then held that the work-product protection had been waived because the "memo was disclosed to the news media." Id. at 1187 & n.193. [5]

The undisputed fact is that the memoranda and e-mails attributed to Mr. Chesebro, which the State evidently seeks to introduce at trial, were written in his capacity as a lawyer for the Trump Campaign. The memoranda dated December 6 and 9, 2020, and the e-mail dated January 1, 2021, have the same type of legal analysis that was found in Eastman v. Thompson to be presumptively protected attorney work product, prepared in anticipation of litigation. Like the November 18 memorandum and the December 13 e-mail, they sketch possible strategies for maximizing the time available for the Trump Campaign to prevail in litigation, in part by seeking to set up a test case in the Supreme Court to resolve constitutional questions concerning the Electoral Count Act, on which the Biden Campaign was relying heavily in its own strategy.

Indeed, the documents attributed to Mr. Chesebro were not prepared merely in anticipation of possible litigation. Mr. Chesebro's legal analysis was premised on the undisputed truth that there was ongoing litigation, and that the deployment of alternate or contingent electors was essential to preventing the pending litigation from becoming moot on December 14, 2020, and to preserve the ability of the States to have their electoral votes accurately counted in Congress, based on the final outcome of litigation, on January 6, 2021. As such, all memoranda and e-mails authored for the Trump Campaign in

[5] The court employed passive voice and made no finding as to who leaked the November 18 memorandum. We are unaware of any evidence that either the Trump Campaign or anyone affiliated with it leaked the memorandum, and it appears clear that by the time it was leaked and published by the *New York Times* on Feb. 2, 2022, numerous government investigators had obtained access to a vast array of documents relating to the Trump Campaign's litigation over the 2020 election results.

furtherance of the alternate-electors legal strategy constitute core attorney opinion work product, and thus are protected under both the work-product doctrine and the attorney-client privilege.

ARGUMENT AND CITATION TO AUTHORITY

Under Georgia law, "[t]o secure disclosure of privileged documents under th[e] [crime-fraud] exception [to the attorney–client and work product privileges protected by O.C.G.A. § 24-5-501(a)(2)], the party seeking disclosure must make a prima facie showing that the communication was made in furtherance of illegal or fraudulent activity. This cannot be made merely by making a charge of fraud." Christenbury v. Locke Lord Bissell & Liddell, LLP, 285 F.R.D. 675, 686 (N.D. Ga. 2021) (internal citations and quotations omitted); see also In re Fulton Cnty. Grand Jury Proc., 244 Ga. App. 380, 382 (2000) (stating that "the attorney–client privilege does not extend to communications which occur before perpetration of a fraud or commission of a crime and which relate thereto").

In order to establish a prima facie case for the crime-fraud exception to the attorney–client privilege, the State:

> must rely on evidence independent of the communications between the client and the attorney. In addition, where an attorney has represented a defendant in the same criminal matter in which the attorney is implicated, the crime-fraud exception "does not thereby justify an abrogation of the privilege as to all dealings between the two, as attorney and client."

United States v. Marshank, 777 F. Supp. 1507, 1527 (N.D. Cal. 1991) (quoting United States v. Alexander, 736 F. Supp. 968, 1003 (D. Minn. 1990)).); see also Rose v. Com. Factors of Atlanta, 262 Ga. App. 528, 529 (2003) ("The crime-fraud exception does not

require proof of the existence of a crime or fraud to overcome the claim that a communication is privileged. Rather, its applicability depends upon whether a prima facie case has been made that the communication was made in furtherance of an illegal or fraudulent activity."). In Rose, the party seeking to establish attorney-client privilege had given testimony in a deposition wherein they admitted to lying and falsifying documents. In so doing, the court found that the deposition testimony "constituted prima facie evidence of the existence of a fraudulent scheme." Id. at 530. This admission constituted a prima facie case that the communications had been made in furtherance of illegal or fraudulent activity.

Here, there is no such admission. In this case, Mr. Chesebro's allegedly unlawful actions (writing legal memos and e-mails) were taken in his role as a lawyer for the Trump Campaign, and the advice he gave was based on the Constitution, statutory interpretation, and legal and historical precedent. The State has made absolutely no showing of any activity by Mr. Chesebro that was outside the bounds of his role as a lawyer for the Trump Campaign, much less in furtherance of criminal or fraudulent activity.

In order to determine whether the crime-fraud exception applies, parties are allowed to ask the Court for an in camera review of the privileged documents. United States v. Zolin, 491 U.S. 554 (1989).

WHEREFORE, Mr. Chesebro requests that the Court suppress any memoranda, work product, or other applicable attorney–client communications from admission into evidence at trial.

Respectfully submitted, this, the 20th day of September, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served, a copy of the within and foregoing MOTION TO EXCLUDE ANY LEGAL MEMORANDA AND AFFILIATED CORRESPONDENCE UNDER O.C.G.A. § 24-5-501 upon all parties via the Fulton County e-filing system.

This, the 20th day of September, 2023.

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