

FULTON COUNTY SUPERIOR COURT  
STATE OF GEORGIA

STATE OF GEORGIA,

v.

KENNETH CHESEBRO *ET AL.*,

DEFENDANTS.

CASE No. 23SC188947

JUDGE MCAFEE

**MOTION TO DISMISS INDICTMENT FOR FAILURE TO COMPLY WITH SPECIAL  
PROSECUTOR'S OATH REQUIREMENT**

COMES NOW, Kenneth Chesebro, by and through undersigned counsel, and moves to dismiss the indictment due to the fact Special Assistant District Attorney Nathan Wade, who has and continues to serve as lead counsel in this case—including during the presentment of the case to the criminal grand jury and at the time the underlying indictment was returned—was not an authorized public officer by Georgia law.<sup>1</sup> In support thereof, Mr. Chesebro shows as follows:

**I. Background**

- a. Special ADAs are Required to Take *And File* Oaths Prior to Engaging in Their Duties

Georgia law permits an elected district attorney to appoint “special assistant district attorneys.” *See* GA. UNIF. SUPER. CT. R. 42.1. However, once a District Attorney appoints a Special ADA, that Special ADA must take *and file* certain oaths. O.C.G.A. §

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<sup>1</sup> While undersigned recognizes that the motions deadline was September 20, undersigned did not obtain all of the factual information necessary to file this motion until October 3, 2023, and filed this motion as soon as reasonably practical thereafter.

45-3-1. Unless and until a Special ADA takes *and files* these required oaths, they are not permitted to engage in any duties or activity as a Special ADA. O.C.G.A. § 45-3-8.<sup>2</sup>

More specifically, O.C.G.A. § 15-18-2 provides the district attorney's oath of office. Under O.C.G.A. § 45-3-7, deputies must take the same oaths of office as their principals take.<sup>3</sup> Although O.C.G.A. § 45-3-7 states that the statute "shall not apply to any deputy who may be employed in particular cases only," a special prosecutor must still take an oath of office (whether assigned to one matter or multiple matters), as must every public officer in the State of Georgia:

Every public officer shall: (1) take the oath of office; (2) take any oath prescribed by the Constitution of Georgia; (3) swear that he or she is not the holder of any unaccounted for public money due this state or any political subdivision or authority thereof; (4) swear that he or she is not the holder of any office of trust under the government of the United States, any other state, or any foreign state which he or she is by the laws of the State of Georgia prohibited from holding; (5) swear that he or she is otherwise qualified to hold said office according to the

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<sup>2</sup> Although O.C.G.A. § 45-3-10 provides that "[t]he official acts of an officer shall be valid regardless of his omission to take and file the oath, *except in cases where so specially declared*" (emphasis added), prosecuting a criminal case is one such specially declared situation. *See also Martin v. State*, 195 Ga. App. 548 (1990). This case dealt with the Oath of Office for an Assistant Solicitor who was not sworn. The basis for the holding that the lack of oath was not error was due primarily to the fact that the objections were not raised in a timely fashion and thereby waived (no ruling was made on the merits due to the waiver). In support of this holding, the *Martin* court cited *Mach v. State*, 109 Ga. App. 154 (1964). *Mach* dealt with the presiding judge appointing a Solicitor General *Pro Tem*; however, the issue was whether his conflicts would allow him to serve in that position (in addition to the issue of the Solicitor General not being sworn). *Id.* at 156. *Mach's* ruling (as to the oath) was based upon the fact that "[t]here is no statute of statewide application providing for the appointment of an assistant solicitor general." *Id.* at 157. These cases are distinguishable from the case at bar due to the fact that we have specific statutes controlling the oath requirements and the filing thereof for felony prosecutors.

<sup>3</sup> *Nave v. State*, 171 Ga. App. 165, 166 (1984) (explaining that assistant district attorneys take the same oath as that statutorily provided for district attorneys).

Constitution and laws of Georgia; [and] (6) swear that he or she will support the Constitution of the United States and of this state.

O.C.G.A. § 45-3-1. Further, “[n]o officer or deputy required by law to take and file the oaths . . . shall enter upon the duties of his office *without first taking and filing* the same in the proper office.” O.C.G.A. § 45-3-8 (emphasis added). In fact, Georgia law makes clear that “[a]ny officer or deputy required by law to take *and file* an official oath who shall enter upon the duties of his office without taking *and filing* the same in the proper office shall be guilty of a misdemeanor.” O.C.G.A. § 45-3-9 (emphasis added).

b. Special ADA Nathan Wade Did Not File His Oaths Prior to Presenting to Grand Jury

Upon information and belief, the Fulton County District Attorney’s Office hired “Special Prosecutor” Mr. Nathan Wade to be lead counsel in this matter sometime in or about November 2021. For this role, Mr. Wade was given authority to investigate and assist the Special Purpose Grand Jury (“SPGJ”) and then present this matter to a criminal grand jury.<sup>4</sup>

It appears that, as required by law, Mr. Wade swore both an Oath of Special Assistant District Attorney (on November 1, 2021) and a Loyalty Oath (on November 25, 2021). *See Exhibit A*. However, neither oath was filed until well after Mr. Wade had already presented this case to the criminal grand jury and obtained a true bill. In fact,

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<sup>4</sup> On January 24, 2022, pursuant to the District Attorney’s request, Fulton County Chief Judge Christopher Brasher ordered a special purpose grand jury be empaneled. On May 2, 2022, the SPGJ was sworn and heard evidence beginning on June 1, 2022. On December 15, 2022, the SPGJ rendered its report and concluded its service. On August 14, 2023, an indictment was filed after a criminal grand jury issued a true bill in the above-styled case.

Mr. Wade did not file either of these oaths until September 27, 2023, which was soon after undersigned counsel sent Mr. Wade an email inquiring about this apparent lapse (and asking for proof of filing). *See Exhibit B.*

That means that at the time Mr. Wade appeared before the criminal grand jury in this case and sought (and obtained) a criminal indictment, he had not filed an oath of office as a special prosecutor in any Georgia court. Yet, Mr. Wade held himself out as lead counsel for the State and as a duly sworn special prosecutor with the power and authorization to compel the attendance of witnesses, present evidence, examine witnesses, negotiate immunity for witnesses, and argue and present both law and facts to the grand jury. Mr. Wade also signed numerous subpoenas witnesses to appear before both the SPGJ and the criminal grand jury, negotiated legal immunity deals on behalf of the State for certain witnesses appearing before the SPGJ (many of whom are on the State's witness list), and then presented this indictment to a criminal grand jury on behalf of the State of Georgia, ultimately obtaining a criminal indictment against 19 individuals, including Mr. Chesebro.

Despite these actions, Mr. Wade had no more legal authority than any private member of the State Bar of Georgia to even be present in the grand jury room, let alone serve as the grand jury's legal advisor. *See generally* O.C.G.A § 15-18-6 (it is the duty of the district attorney to attend to the grand jury). Accordingly, any and all actions taken by Mr. Wade prior to September 27, 2023, including presenting this case to the criminal grand jury and obtaining an indictment, are void as a matter of law.

## II. ARGUMENT AND CITATION TO AUTHORITY

It is undisputable that, as a special prosecutor, Mr. Wade is a public officer. Thus, he was required to take *and file* an oath *before* performing any duties as a special assistant district attorney. O.C.G.A. §§ 45-3-1; 45-3-8 (“[n]o officer or deputy required by law to take and file the oaths . . . shall enter upon the duties of his office *without first taking and filing* the same in the proper office” (emphasis added)). The State of Georgia’s Prosecuting Attorney’s Council (“PAC”) even provides for a copy of the “Oath of Special Assistant District Attorney” which outlines the above listed subsections as part of the mandatory oath that must be taken, sworn to before someone authorized to administer oaths, and then filed in the appropriate office. *See Exhibit C.*

To be clear, Mr. Wade’s apparent failure to file his oaths before taking action as a Special ADA should not be chalked up to mere “technical non-compliance.” This is proven by the fact that the Georgia legislature decided that it was so important not only to take, but to file, an oath, that it imposed misdemeanor criminal liability on those who fail to do so. O.C.G.A. § 45-3-9 (making it a misdemeanor crime to take any action as a public officer without first taking *and filing* the appropriate oaths).

Because Mr. Wade did not file his oaths as expressly required by law, any actions that he took prior to filing the oath on September 27, 2023, are void as a matter of law. This includes presenting this case to the criminal grand jury and obtaining an indictment in return. Accordingly, the indictment in this case must be dismissed.

WHEREFORE, Mr. Chesebro requests that this Honorable Court grant this motion and dismiss the indictment.

Respectfully submitted, this the 4th day of October, 2023.

/s/ Scott R. Grubman  
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Georgia Bar No. 317011  
Counsel for Defendant

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JUDGE MCAFEE

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing *Motion to Dismiss the Indictment for Failure to Comply with Special Prosecutor's Oath Requirement* to all parties via the Fulton County e-filing system.

This the 4th day of October, 2023.

/s/ Scott R. Grubman

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# EXHIBIT A



# LOYALTY OATH

STATE OF GEORGIA

COUNTY OF Fulton

I, Nathan Wade (name)

a citizen of Cobb County Georgia and being

an employee of Fulton District Attorney Office

and the recipient of public funds for services rendered as such employee, do hereby solemnly swear and affirm that I will support the Constitution of the United States and the Constitution of Georgia.

SO HELP ME GOD!

Sworn to and subscribed before me, this the )

15<sup>th</sup> day of November, 2021 )

[Signature] )

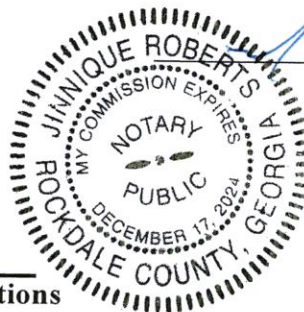
Notary

Signature

(O.C.G.A. 45-3-11)

(O.C.G.A. 45-3-12)

(O.C.G.A. 45-3-13)



## Directions

The oath, when taken, must be attached to the oath of office and filed therewith as required by law.

The loyalty oath required by Code Sections 45-3-11 through 45-3-15 shall apply to all elected officers of this state, including the Governor, constitutional officers, elected officials or any political subdivision of the government of Georgia, and local school board officials (O.C.G.A. 45-3-12).

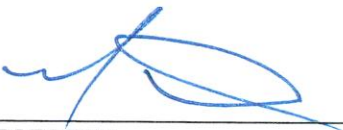
OATH OF SPECIAL ASSISTANT DISTRICT ATTORNEY

ATLANTA JUDICIAL CIRCUIT

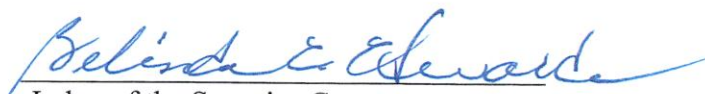
I, Natha Wcd do swear that I will faithfully and impartially, and without fear, favor, or affection, discharge my duties as a Special Assistant District Attorney, and will take only my lawful compensation.

I do further solemnly swear and affirm that I am not the holder of any unaccounted public money due this State; that I am not the holder of any office of trust under the government of the United States (except postmaster), nor any one of the several states, nor of any foreign state; and, that I am otherwise qualified to hold said office, according to the Constitution and Laws of Georgia, and that I will support the Constitution of the United States and of this State.

SO HELP ME GOD!

  
\_\_\_\_\_  
ATTORNEY

Sworn to and subscribed before me  
the 1<sup>st</sup> day of November, 2021.

  
\_\_\_\_\_  
Judge of the Superior Court  
Atlanta Judicial Circuit

## EXHIBIT B

2023-EX-001349  
FILED IN OFFICE

SEP 27 2023



CHÉ ALEXANDER  
Clerk of Superior Court

Fulton County, Georgia

### LOYALTY OATH

STATE OF GEORGIA

COUNTY OF Fulton

I, Nathan Wade (name)

a citizen of Cobb County Georgia and being

an employee of Fulton District Attorney office

and the recipient of public funds for services rendered as such employee, do hereby solemnly swear and affirm that I will support the Constitution of the United States and the Constitution of Georgia.

SO HELP ME GOD!

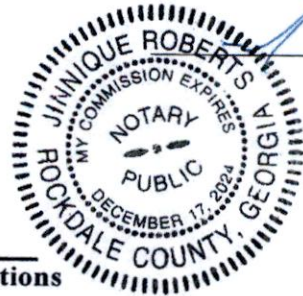
Sworn to and subscribed before me, this the )  
15<sup>th</sup> day of November, 2021 )

[Signature] )  
\_\_\_\_\_) )  
Notary

Signature

[Signature]

- (O.C.G.A. 45-3-11)
- (O.C.G.A. 45-3-12)
- (O.C.G.A. 45-3-13)



#### Directions

The oath, when taken, must be attached to the oath of office and filed therewith as required by law.

The loyalty oath required by Code Sections 45-3-11 through 45-3-15 shall apply to all elected officers of this state, including the Governor, constitutional officers, elected officials or any political subdivision of the government of Georgia, and local school board officials (O.C.G.A. 45-3-12).

# EXHIBIT C

**OATH OF SPECIAL ASSISTANT DISTRICT ATTORNEY**

STATE OF GEORGIA

COUNTY OF .....

.....JUDICIAL CIRCUIT

I, ..... (name) do swear that I will faithfully and impartially and without fear, favor, or affection discharge my duties as SPECIAL ASSISTANT DISTRICT ATTORNEY, and will take only my lawful compensation.

I do further swear (or affirm) that I am not the holder of any unaccounted for public money due this State, or any political subdivision or authority thereof; that I am not the holder of any office of trust under the government of the United States, any other state, or any foreign state which I am prohibited from holding by the laws of the State of Georgia; and that I am otherwise qualified to hold said office, according to the Constitution and Laws of Georgia; and that I will support the Constitutions of the United States and of this state.

SO HELP ME GOD!

Sworn to and subscribed before me, this the )  
 )  
..... day of ..... 20..... ) .....  
 ) Signature  
..... )

Title: .....

**(O.C.G.A. §§ 15-18-21; 45-3-1; 45-3-7)**

**Directions**

The oath, when taken must be filed as provided in the Official Code of Georgia Annotated, O.C.G.A. § 45-3-4. The oath must be administered by an officer of this state who is authorized to administer oaths. O.C.G.A. § 45-3-3. These include the Governor, judges of the superior, state and probate courts. Ga. Op. Att’y Gen. U80-481.