In the Court of Appeals of the State of Georgia

IN RE: 2 MAY SPECIAL PURPOSE GRAND JURY	)	Case No. A23A1453

DISTRICT ATTORNEY'S BRIEF OF APPELLEE

COMES NOW Appellee, the State of Georgia, by and through Fani T. Willis, Fulton County District Attorney for the Atlanta Judicial Circuit, and files this Brief of Appellee in support of the judgment of the Fulton County Superior Court. Appellee respectfully requests that this Court affirm the judgment of the Superior Court.

STATEMENT OF THE CASE AND MATERIAL FACTS

The present appeal involves the Superior Court of Fulton County's 13 Feburary 2023 Order Re: Special Purpose Grand Jury's Final Report in case number 2022-EX-000024. There exist no material disputes of fact, and Appellants' statement of the case contains no material inconsistencies.

ARGUMENT AND CITATION OF AUTHORITY

Appellants argue that the Superior Court committed reversible error in two distinct manners: by determining that the final report of the Fulton County Special Purpose Grand Jury was not a "court record" as defined by Uniform Superior Court Rule 21, and by temporarily delaying the publication of some portions of said report due to concerns of fundamental fairness. The

Superior Court did not err because Appellants' own authorities provide a definition of "court record" which would exclude the final report in this case and because the Superior Court's ruling regarding substantive due process concerns represents a prudential application of established Georgia precedent.

I. The Superior Court did not abuse its discretion in determining that the report at issue in this case is not a "court record" under Uniform Superior Court Rule 21.

Appellants first assert that the Superior Court erred in concluding that the Special Purpose Grand Jury's final report[1] was not a "court record" subject to Uniform Superior Court Rule 21. Appellants primarily base this enumeration of error upon two arguments. First, relying upon *In re Gwinnett County Grand Jury*, 284 Ga. 510 (2008), they submit that because the document memorializes "the *outcome* of grand jury proceedings," the report is clearly a court record under Rule 21. Second, relying upon *Undisclosed LLC v. State*, 302 Ga. 418 (2017), Appellants insist that because the report is a record that has played "a central role in the adjudicative process," it is properly defined as a court record under Rule 21. Because the report has neither been returned in open court nor filed with the court clerk

[1] Hereinafter, the Special Purpose Grand Jury will be referred to as "SPGJ" or "the SPGJ," while their final report will be referred to as either "the SPGJ report" or simply "the report."

for entry into the official record, Appellants' arguments are without merit, and the Superior Court's order should be upheld.[2]

A. The report is not a court record because it is not a "presentment made in open court."

Appellants first attempt to draw a distinction between the traditional secrecy afforded to grand jury operations or deliberations and a grand jury presentment or report delivered in public (App. Br. at 10-11). They cite *In re Gwinnett County Grand Jury* for the proposition that the final product of a grand jury investigation is necessarily "a court record under USCR 21 that is available for public inspection unless public access is otherwise limited by law or by USCR 21" (App. Br. at 10, *citing id.*, 284 Ga. at 513-14). It is true that in that case, the Supreme Court determined that the grand jury presentment at issue was a court record. The presentment in *Gwinnett County* was produced by a regular grand jury following a civil investigation as authorized under O.C.G.A. § 15-12-71(b)(2). *See id.* at 510. However,

[2] Regarding the applicable standard of review, it appears that decisions restricting or granting access under Rule 21 are reviewed for abuse of discretion. *See Savannah College of Art & Design v. Sch. of Visual Arts*, 270 Ga. 791, 795 (1999) (Fletcher, P.J., dissenting) ("I agree with the majority opinion that the trial court's decision granting or limiting access under Rule 21 is reviewed for abuse of discretion.") It does not appear clear that a decision that certain documents are not "court records" under Rule 21 in the first place is also reviewed under an abuse of discretion standard. However, Appellee proceeds under this understanding, and Appellants suggest no other standard of review.

neither the facts of that case nor the Supreme Court's reasoning within it support the conclusion that the SPGJ report in *this* case is a "court record" under Rule 21.

The Supreme Court first characterizes the presentment in *Gwinnett County* as "public presentments and recommendations"; the presentment was apparently "made in open court at the conclusion of the Grand Jury's investigation." *Id.* at 510-11. There was thus no question that, from the start, the presentment was made publicly available. The Court ultimately distinguished between evidence and testimony received by a grand jury and "presentments made by the grand jury *in open court* at the conclusion of the grand jury's investigation." *Id.* at 513 (emphasis added). Evidence, testimony, or other materials were *not* court records "because the press and public have not traditionally enjoyed access to such material due to the preservation of the secrecy of grand jury proceedings." *Id.* However, because the presentment "was made in open court, it is a court record under USCR 21." *Id.* at 514. The crucial distinction identified in *Gwinnett County*, then, is clearly between the majority of materials associated with a grand jury and those which are made or returned "in open court," where the public and the press have always enjoyed access. The Court even notes that even if grand

jury evidence and testimony are "records of the superior court, they are not 'court records' subject to USCR 21…" *Id.* at 513.

No such distinction can be made in this case because the SPGJ report has never been returned "in open court" or presented anywhere that the press or the public have "traditionally enjoyed access." As the Superior Court described, the report went directly from the grand jurors, to the Supervising Judge, to the District Attorney. V6-1465-66. This sequence was entirely as authorized under the law; nowhere in O.C.G.A. §§ 15-12-100 or 15-12-101 is it indicated that a special purpose grand jury's final report must be, or should be, returned in open court. In this case, where the SPGJ was requested and assisted *by* the District Attorney, and where the SPGJ was empowered to make recommendations *to* the District Attorney, the Judge did no more than ensure that the requirements of the law were met before *providing the report to the District Attorney*.

Additionally, if there is any "traditionally enjoyed" form of access for the public or the press to such a report, or even special purpose grand jury reports in general, Appellants have not identified such. There is simply nothing about this SPGJ report that, based on the reasoning of *Gwinnett County*, would render it a "court record" under Rule 21 rather than merely a "record of the superior court," as the Supreme Court carefully distinguished

the terms. Appellants elide such a distinction in an attempt to paint *Gwinnett County*'s holding with a much broader brush, but the circumstances of this case make the SPGJ report akin to "records of the superior court" rather than a public presentment delivered in open court. As a result, *Gwinnett County* does not support the designation of the report as a "court record" under Rule 21.

B. The report has never been "filed" as that term is commonly understood or defined under Georgia law.

The next argument presented by Appellants relies upon principles and reasoning from *Undisclosed LLC v. State*, 302 Ga. 418 (2017), in which the Supreme Court provided several traditional examples of "court records" as that term is defined under Rule 21. 302 Ga. at 430-31. Appellants contend that the report in this case is a court record because falls within two of the classes of court records described in *Undisclosed LLC*: "adjudicative action[s] (rulings, judgment, orders)" and "records which 'play a central role in the adjudicative process'" (App. Br. at 11, 13, *citing Undisclosed LLC*, 302 Ga. at 430-31). However, for two reasons, *Undisclosed LLC* does not support the categorization of the SPGJ report as a "court record."

First, the categories of "court records" provided in *Undisclosed LLC* are given in the context of *trials* rather than grand juries. The case concerns

access to audio recordings of trial proceedings. *Id.* The Supreme Court analyzed the origin and context of Rule 21, examining both the common law and the Appellate Practice Act as it existed when Rule 21 was created. The Court determined that the Act and Rule 21 had consistent definitions for "court records," but the definition it examines from the Appellate Practice Act explicitly begins, "Where a trial in any civil or criminal case is reported by a court reporter…" *Id.* at 429. The various categories of "court records" mentioned by the Appellate Practice Act and named by the Supreme Court in *Undisclosed LLC* are specifically trial materials, and each of the cases to which the Supreme Court cites also involve records associated with trials, or the pre- and post-trial periods. *Id.* at 429-31. It is in this context that the Court provides the examples of "court records," including "adjudicative action[s] (rulings, judgment, orders)" cited by Appellants (App. Br. at 11, *citing id.* at 431). The definitions provided are therefore inapposite to the present case and grand jury contexts generally. *Undisclosed LLC* says nothing that should suggest that a grand jury report is akin to a "ruling, judgment, or order" as those terms are understood in a trial context. Such an extension of the definitions in *Undisclosed LLC* is simply not necessary; as discussed above, *In re Gwinnett County Grand Jury* has analyzed grand jury materials in light of Rule 21 and provided a relevant and workable criterion

(whether materials were returned in open court) for determining whether or not they should be considered "court records" to which the public and the press have traditionally enjoyed access. The definitions submitted by Appellants from *Undisclosed LLC* are therefore not applicable in the circumstances of this case.

The second reason *Undisclosed LLC* does not support Appellants' arguments is that, even if its definitions *were* applicable here, the fundamental requirement emphasized by the Supreme Court in that case is not present in this instance. In finding that the Appellate Practice Act and Rule 21 had consistent definitions for "court records," the Court determined that the definitions each "reflect the same basic principle: for something to be a court record, it must be filed with the court." *Id.* at 430. This is the central holding of *Undisclosed LLC*, repeated several times: "All of these items must be on file with the court before becoming a court record… This is in accord with what we said in [*Atlanta Journal & Constitution v. Long*, 258 Ga. 410 (1988)] that the right of access begins when a 'judicial document is filed.'… Defining the scope of a 'court record' to require filing with the court is also consistent with conclusions drawn by other jurisdictions…" *Id.* at 431.

Appellants make a single reference to the Superior Court being the "'official court' to which the Report was appropriately submitted 'per

statutory process'" (App. Br. at 13). While this is true, it does not mean that the report was "filed" as that term is defined under Georgia law; instead, it appears that the statutory scheme for special purpose grand juries does not contemplate such "filing." The term "file" "is not ambiguous and has a common definition: '[t]o deliver a legal document to the court clerk or record custodian for placement into the official record.'" *In re Estate of Boyd*, 340 Ga. App. 744, 748 (2017) (citing Black's Law Dictionary (10th ed. 2014)); *see also Walls v. Walls*, 278 Ga. 206, 209 (2004) (Carley, J., concurring specially) (also defining "file" using Black's Law Dictionary). O.C.G.A. §§ 15-12-100 and 15-12-101 do not require a process matching this definition. Clearly, the Supervising Judge is not the court clerk, nor is he the "official custodian" for the report (particularly in this case). However, even if this were so, the report was not delivered to him "for placement into the official record" in the sense that a pleading, transcript, or other document is.

The Superior Court's own understanding reflects this and echoes the requirements of Georgia law's definition for "file": as Appellants observe, the Court noted that the report "sits in no docket or official court or clerk file" (App. Br. at 13). V6-1466. While the Judge was required by O.C.G.A. § 15-12-101 to receive the report from the SPGJ, he was not its custodian, nor was he to place it into the "official record." Instead, the report "incidentally passed

through the Court's hands" as required under the law. *Id.* O.C.G.A. §§ 15-12-100 and 15-12-101 make no requirement of filing as that term is specifically understood, and without being "filed," a document cannot become a court record. Again, the better test for when a grand jury report or presentment becomes a court document is *whether it has been returned in open court*. Appellants assert that the report has played "a central role in the adjudicative process" as *Undisclosed LLC* tells us a court record might (App. Br. at 13). However, not only is that term intended to apply to documents in a trial context, it also contemplates only documents which have been *filed*. Because the report here was not and was never required to be, Appellants arguments are not applicable to the case at hand.

Instead, the Superior Court's understanding of the report's status appears more comfortably aligned with both *In re Gwinnett County* and *Undisclosed LLC* than the Appellants' arguments. The Court observed that the report is, and always was, intended to go to the District Attorney, who originally requested the impanelment of the SPGJ and who assisted its efforts for months. V6-1465-66. The report was not delivered to the Superior Court to go into the "official record," as a pleading might, but to go to the District Attorney; it was not intended to influence or persuade the Superior Court as part of an "adjudicative process," as a motion or complaint might,

but to persuade the District Attorney. Nor is the Superior Court the intended custodian of the report, which "sits in no docket or official court or clerk file." *Id.* The report thus lacks the *sine qua non* for a court record of having been "filed." Naturally, having never been returned, read, or otherwise brought through open court, it also lacks the quality separating mere "records of the superior court" from "court records" under *In re Gwinnett County Grand Jury*. The Superior Court understood that it had to fulfill its required role as outlined by statute but also that the report was created by the SPGJ at the request of, and specifically for, the District Attorney, whose investigation is ongoing. Such a document cannot be said to be a "court record" under any of the definitions suggested by Appellants, and the Superior Court did not abuse its discretion in declining to define it as such.

Finally, the District Attorney observes that defining the SPGJ's report as a court record under Rule 21 in these circumstances would severely hinder the utility of special purpose grand juries in complex criminal investigations. O.C.G.A. § 15-12-100 specifically authorizes district attorneys to request special purpose grand juries, which are empowered to investigate any potential violations of state law. The flexibility of the statute makes special purpose grand juries particularly useful for prosecutors in complex, highly specific, or long-term investigations such as the one in which this SPGJ has

played a role. Under Georgia's Open Records Act, documents and items associated with ongoing criminal investigations are presumptively unavailable for public inspection. *See* O.C.G.A. § 50-18-72(a)(4). If a special purpose grand jury's report, requested by and intended for a district attorney's evaluation, became a presumptively public court record with immediate effect, a prosecutor's use of a special purpose grand jury would risk revealing information which would otherwise remain protected until the termination of the case in any other criminal investigatory context. If the report can remain for the district attorney's eyes only at least until final charging decisions have been made, as in the present case, the effectiveness and usefulness of special purpose grand juries will remain unhindered. The Superior Court's approach appropriately balances the public's interest in the investigation and prosecution of criminal laws with its interest in access to the courts in matters of public concern. The District Attorney respectfully requests that this Court affirm the judgment of the Superior Court that the SPGJ report is not a court record under Uniform Superior Court Rule 21.

II. The Superior Court did not err in delaying the publication of specific portions of the report based on concerns related to substantive due process and fundamental fairness.

In its order, the Superior Court declined to immediately publish certain portions of the SPGJ's report. Specifically, any section of the report which contained the names of specific individuals has been temporarily withheld from the public. V6-1470-71. The Court concluded that the role of the SPGJ as a tool of investigation on behalf of the District Attorney raised sufficient substantive due process concerns to warrant delaying the release of those specific sections until after the District Attorney had announced formal charging decisions. Appellants contend that the Court's prudential, temporary delay in publication constitutes reversible error. The District Attorney disagrees.

It is true that, as Appellants observe, the Superior Court's order did not cite to *Paul v. Davis*, 424 U.S. 693 (1976), in which the United States Supreme Court provided guidance on the outer limits of substantive due process rights and determined that purely reputational harm did not require constitutional protection. Nor does the District Attorney disagree with Appellants' description of *Paul* or its observation that the Georgia Supreme Court has applied *Paul* and its principles in certain contexts (App. Br. at 18-23). The District Attorney contends merely that the Superior Court did not commit reversible error by instituting a temporary delay in publication in

order for the SPGJ's report not to precede formal charging decisions from the District Attorney.

The Superior Court reached its conclusions after an analysis of several cases, including *In re July-August, 2003 DeKalb County Grand Jury*, 265 Ga. 870 (2004); *In re Presentments of Lowndes County Grand Jury, March Term 1982*, 166 Ga. App. 258 (1983); *Thompson v. Macon-Bibb County Hosp. Auth.*, 246 Ga. 777 (1980); and *Kelley v. Tanksley*, 105 Ga. App. 65 (1961). These cases suggest, essentially, that when "identifiable individuals referred to in the such [reports] are afforded no statutory mechanism by which they may respond to the charges against them, 'serious questions of due process and fairness' are raised." *Lowndes County*, 166 Ga. App. at 258, quoting *Thompson*, 246 Ga. at 778. Appellants actually do not appear to question the Superior Court's analysis of these cases, taking pains to point out that the Court was following established precedent; they argue only that "that precedent itself has never acknowledge the transformation of due process rights rendered by *Paul*" (App. Br. at 23).

It may very well be that, eventually, this Court and the Supreme Court will concretely apply the principles of *Paul* to criminal grand jury contexts, reaching precisely the conclusions asserted by Appellants. It is true, for example, that Congress has recommended charges against several

individuals in their own investigation into the aftermath of the 2020 election without substantive due process concerns being raised (App. Br. at 21). However, where the Georgia Supreme Court has thus far declined to extend the reasoning of *Paul* to a context such as the one in this case, despite having had the opportunity to do so (as in *In re July-August, 2003 DeKalb County Grand Jury* or *Thompson*), it cannot be reversible error for the Superior Court to follow what state precedent does exist in order to prudentially safeguard certain individuals from possible constitutional harm. *See State v. Able*, 321 Ga. App. 632, 636 (2013) (judges are charged with "faithfully following the precedents established by higher courts"); *State v. Smith*, 308 Ga. App. 345, 352 (1) (2011) ("[T]he doctrine of stare decisis prohibits this Court from ignoring the valid precedent of a higher court.").

The parties agree that the Superior Court faithfully applied existing precedent to the instant case in its order; that *Paul* appears to place purely reputational harms outside the protections of substantive due process; and that Georgia courts have thus far declined to apply *Paul* in criminal grand jury contexts. The parties simply disagree about whether the Superior Court erred in opting not to affirmatively apply *Paul* on its own. Where neither this Court nor the state Supreme Court have chosen to take that step, the Superior Court cannot be said to have erred in doing the same.

CONCLUSION

For all these reasons, Appellee prays that this Court AFFIRM the judgment of the Superior Court.

Respectfully submitted this 24th day of July, 2023.

/s/ F. McDonald Wakeford

F. MCDONALD WAKEFORD
Chief Senior Assistant District Attorney
Georgia State Bar No. 414898

Office of the District Attorney
Atlanta Judicial Circuit
136 Pryor Street SW, Third Floor
Atlanta, GA 30303
Tel. (404) 375-0281 / *Fax* (404) 893-2769
fmcdonald.wakeford@fultoncountyga.gov

CERTIFICATION AS TO GEORGIA COURT OF APPEALS RULE 24

I, attorney F. McDonald Wakeford, certify on behalf of Appellee, the State of Georgia, that this submission does not exceed the word count limit imposed by Rule 24.

/s/ F. McDonald Wakeford

F. MCDONALD WAKEFORD
Chief Senior Assistant District Attorney

CERTIFICATE OF SERVICE

I certify that there is a prior agreement with Appellants' counsel of record to allow documents in a .pdf format sent via email to suffice for service. I further certify that I have served the within and foregoing Brief of Appellee upon counsel of record for Appellants by email to:

Thomas Clyde
Lesli N. Gaither
Kurtis G. Anderson
Kilpatrick Townsend & Stockton LLP
1100 Peachtree Street NE, Suite 2800
Atlanta, GA 30309-4528
(404) 815-6500 (Telephone)
(404) 815-6555 (Facsimile)
tclyde@kilpatricktownsend.com
lgaither@kilpatricktownsend.com
kganderson@kilpatricktownsend.com

This 24th day of July, 2023.

/s/ F. McDonald Wakeford

F. MCDONALD WAKEFORD
Chief Senior Assistant District Attorney