FULTON COUNTY SUPERIOR COURT
STATE OF GEORGIA

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

MOTION TO SPEAK WITH GRAND JURORS TO DETERMINE WHETHER THE INDICTMENT WAS PROCURED IN SUBSTANTIAL COMPLIANCE WITH REQUIRED SAFEGUARDS FOR THE ACCUSED'S RIGHTS

The grand jury in the above-styled case returned an indictment on August 14, 2023. It charged 19 defendants (and 30 unindicted co-conspirators) with various complex offenses, including an overarching RICO conspiracy. The indictment, in numerous respects, is unique in the annals of Georgia jurisprudence. Among the key features of this indictment are its length and prolixity as well as the inclusion of a table of contents and a dramatis personae within the charging clauses of the indictment.

In order to ensure the preservation of Mr. Chesebro's right to due process, as well as his right to be charged only on the basis of an indictment returned by a properly constituted grand jury, his counsel seek to determine, through voluntary interviews of the grand jurors, whether the grand jurors actually read the entire indictment or, alternatively, whether it was merely summarized for them.[1] To be clear, at no time will Mr. Chesebro's counsel (or anyone working on counsel's behalf) attempt to question any grand juror about the content of their deliberations.

Two questions are posed by this motion:

[1] And, if the latter, whether a PowerPoint (or some other method) was used to present the case to the grand jury in less than one day.

(1) Is an indictment that has been returned by a grand jury valid if the grand jurors never read the indictment, but instead the indictment was simply summarized by the prosecutor (e.g., orally, PowerPoint, or other form of presentation)?

(2) Should an attorney be prohibited from ever questioning grand jurors about whether the grand jurors read and understood the indictment before it was returned as a true bill (and the corollary question of whether the indictment was simply summarized)?

Admittedly, neither question has been squarely presented to an appellate court in this state. Mr. Chesebro, however, submits that the answer to both questions must be "no." Further, Mr. Chesebro argues that an indictment returned by a grand jury that has not read the indictment is a nullity. Once that proposition is accepted, it follows ineluctably that Mr. Chesebro (through counsel or counsel's agent) must be authorized to make an inquiry regarding the validity of the grand jury process.

ARGUMENT AND CITATION TO AUTHORITY

Various provisions of the Georgia Code provide that certain offenses (including the charges included in this indictment) may only be leveled against a defendant by means of a grand jury indictment. *See* O.C.G.A. § 17-7-70; *see also* § 17-7-70.1. Unlike various minor offenses, for which the prosecutor may simply draft an accusation to initiate the criminal process, the Constitution, as well as the Code, require that some offenses are too serious to leave the question of whether a person should be charged in the unchecked discretion of the prosecutor.

The right under Georgia law to be tried only upon the return of an indictment by a grand jury is parallel to the federal Fifth Amendment right to be tried only following the return of an indictment by a federal grand jury. For that reason, decisions from the federal courts on the issue of whether an indictment may be returned by a state grand jury that never read the indictment are persuasive authority for this Court to consider in deciding the same issue.

Federal courts have consistently held that if the Fifth Amendment's promise that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury"[2] means anything, it means that a criminal indictment must actually be issued from a grand jury—not some other source. The fundamental concept underlying the Fifth Amendment guarantee is that in order for an indictment to be recognized as actually issuing from a grand jury, it must be the product of an investigative deliberation that is ***independent*** of both the prosecuting attorney and the court. *See United States v. Williams*, 504 U.S. 36, 49, 112 S. Ct. 1735, 1743 (1992) ("Recognizing [the] tradition of independence [of the grand jury], we have said that the Fifth Amendment's constitutional guarantee *presupposes* an investigative body acting independently of either prosecuting attorney *or judge*." (emphases in original) (internal quotation marks and citations omitted)); *United States v. Dionisio*, 410 U.S. 1, 17, 93 S. Ct. 764, 773 (1973) (finding that a grand jury "must be free to pursue its investigations unhindered by external influence"); *Wood v. Georgia*, 370 U.S. 375, 390, 82 S. Ct. 1364, 1373 (1962) (recognizing "[t]he necessity to society of an independent and informed grand jury"); *John Roe, Inc. v. United States* (*In re Grand Jury Proceedings*), 142 F.3d

[2] U.S. CONST. amend. V.

1416, 1425 (11th Cir.1998) (explaining that although a grand jury relies on the judiciary when it seeks subpoenas or contempt sanctions, it "performs its investigative and deliberative functions independently"). Without a guarantee of independence, the indictment would not be the genuine issue of a grand jury within the meaning of the Constitution.

In *United States v. Sigma International, Inc.*,[3] the Eleventh Circuit considered whether an indictment returned by a grand jury which really never considered any evidence would be valid. Although the case was ultimately vacated and is not being offered for any precedential value, what Judge Tjoflat wrote in that case is equally applicable here:

> It is clear, for example, that if a prosecutor simply drew up an "indictment," had a grand jury foreperson sign it, and then used it to charge the defendant with a criminal offense, we would dismiss the "indictment" out of hand as violative of the Fifth Amendment. This is because the "indictment" would in no sense be the product of a constitutionally required grand jury proceeding. So, too, would we dismiss an indictment that was issued by a "kangaroo grand jury"—one whose deliberations were so overborne by a prosecutor or judge that the indictment was, in effect, the prosecutor's or judge's handiwork, and not the result of a considered judgment by an independently functioning grand jury. *See United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir. 1982) (holding that an indictment may be dismissed "when prosecutorial misconduct amounts to overbearing the will of the grand jury so that the indictment is, in effect, that of the prosecutor rather than the grand jury"); *see also Stirone v. United States*, 361 U.S. 212, 218, 80 S. Ct. 270, 273, 4 L.Ed.2d 252 (1960) ("The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.").

[3] 244 F.3d 841, 856 (11th Cir. 2001), *reh'g en banc granted, vacated*, 287 F.3d 1325 (11th Cir. 2002) (mem.).

Sigma Int'l, Inc., 244 F.3d at 856.[4] Thus, if the protection of the grand jury is to have any substance, it would seem to be an indisputable proposition that the grand jury must be presented with a copy of the indictment, and must be given an opportunity to review it, in order to ensure that whatever the defendant faces at trial is the same as the charges returned by the grand jury.

In *Sigma International, Inc.*, Judge Tjoflat expressed suspicion that any prosecutor would think that a grand jury could return a **twenty-one page, multi-count** indictment after hearing only ***two days***' worth of evidence. It's not difficult to imagine what Judge Tjoflat's reaction would be about this case, where the grand jury apparently returned a 98-page indictment, containing 41 separate counts, against 19 defendants in what appears to be, at least based on publicly-available information (the only information available to Mr. Chesebro and his counsel at this time), one single day of consideration (for an investigation that took two years to complete).[5]

> We begin our inquiry by considering what the grand jurors must have been thinking on the first day of the proceedings, September 13, 1995, when Rubinstein announced that he would be asking the grand jury to vote on an indictment the very next day. The announcement must have caused many of the grand jurors to question—at least silently—whether they could, in good conscience and in conformance with their oaths as grand jurors, render a twenty-one page, multi-count indictment against multiple defendants in less than two days.

Id.

[4] Counsel notes, again, that the *Sigma International, Inc.* case was vacated and is not offered for any precedential value. Instead, we quote from this decision only because Judge Tjoflat's legal analysis is surely correct and should be followed by this Court.

[5] Counsel is not aware if the grand jury met on any other days aside from the widely reported Monday, August 14, 2023.

Analogies abound. Consider, for example, the law of "variances and amendments." The law is clear that if the prosecutor argues a theory of guilt to the trial jury that differs from the charges in the indictment, a resulting conviction is invalid. The same with jury instructions: If the trial judge instructs the jury on the elements of an offense, but the elements are not the same as the elements that the grand jury found, then a resulting conviction is invalid. *See Milner v. State*, 297 Ga. App. 859 (2009). The reason is simple. The grand jury—not the prosecutor and not the trial judge—decide precisely what charges the defendant should confront. Not just "in general" or "in summary form," but precisely. If the grand jury, after hearing the evidence decides that the defendant should face a charge of theft by taking, then the indictment will allege the offense of theft by taking and only a theft by taking conviction can be returned by the trial jury. Even minute details in the indictment must be proven at trial. *See Jowers v. State*, 225 Ga. App. 809, 812 (1997). Surely, if minute details matter, the grand jury has an obligation to read the indictment in order to be cognizant of these minute details.

If the grand jury never reads the indictment; if the grand jury does not even know the details of the indictment; if the grand jury is simply the paradigmatic "rubber stamp" that simply sits in the grand jury room and is provided a summary of the charges, then the grand jury has not performed its function and the defendant will not have received the protection that the Code is designed to provide. In other words, why bother with a grand jury if the jurors do not read the indictment and do not review its terms? Any suggestion that the grand jurors perform their function by simply showing up and listening to a prosecutor deliver a closing argument or a PowerPoint presentation belittles the function

that the grand jurors provide.[6]

In sum, the grand jury is an indispensable component of the decision to initiate charges against a defendant. In order to fulfill their responsibilities, the grand jurors must be provided with a copy of the proposed indictment, must be provided ample time to read and review its contents, and must be provided the opportunity to vote on its allegations after having read the charges.[7]

Once it is accepted that the grand jury must read, review, and understand an indictment before it is returned; it follows, ineluctably, that defense counsel must be afforded the opportunity to investigate whether his client's rights were in fact violated by a procedure adopted by a prosecutor to short-circuit or curtail those rights. That is all that defense counsel is attempting to do through this motion. Their investigatory efforts will be narrow, professional, and limited to the proper scope of inquiry. Moreover, counsel will not attempt to talk with any grand juror about the nature of their deliberations.

There is nothing unique about questioning grand jurors. Grand jurors have been questioned about their address (to determine whether the indictment was returned by a properly-constituted grand jury). *See* O.C.G.A. § 15-12-60(a). Grand jurors have been questioned about their relationship to the parties (or their own employment) to determine whether the jurors were qualified to return an indictment. *See* O.C.G.A. § 15-12-70; *Sowers v. State*, 194 Ga. App. 205 (1990). Grand jurors have been questioned about

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[6] There is no statutory authority or case law that authorizes a prosecutor to simply "explain" or "summarize" an indictment.

[7] The fact that the grand jury must be allowed to read and comprehend the indictment is further bolstered by the fact that the petit jury is read the indictment in its entirety both prior to trial and at the conclusion of the trial. *See* Ga. Suggested Pattern Jury Instructions, Vol. II: Criminal Cases (4th ed. 2023), §§ 0.01.00; 1.10.10.

whether the prosecutor remained in the grand jury room during the grand jurors' deliberations (a statutory violation that would void the indictment). *See Colon v. State*, 275 Ga. App. 73 (2005). There has even been an evidentiary hearing to see if at least 12 grand jurors voted to true bill an indictment. *See Tanner v. State*, 163 Ga. 121 (1926) (noting that the defendant put forward evidence that only 11 grand jurors voted to true bill the indictment).

In fact, the Georgia Supreme Court has made clear that "the oath of secrecy no longer extends to the State's attorney, and even the grand jurors' oath encompasses only deliberations and not all things occurring in the grand jury room." *Olsen v. State*, 302 Ga. 290-91 (2017).[8] Further, "[i]t has been pointed out that the need for grand jury secrecy is ended after an indictment has been returned and if the ends of justice require it, statements of grand jury witnesses may be made available to defense counsel." § 13:12. *Discovery of grand jury testimony*, Ga. Criminal Trial Practice § 13:12 (2022-2023 ed.) citing *U.S. v. Socony-Vacuum Oil Co*., 310 U.S. 150 (1940).

The purpose of grand jury secrecy is three-fold as outlined by the Georgia Supreme Court: First, to foster the utmost freedom of disclosure; second, to prevent perjury and the subornation of perjury; and third, to conceal the existence of a pending indictment and prevent the defendant's escape. *See Anderson v. State*, 258 Ga. 70, 72–73 (1988). Questioning the grand jurors about whether they "read the indictment" or whether it was simply summarized does not compromise any of these objectives. Indeed,

[8] For this reason, undersigned counsel could have endeavored to interview grand jurors, so long as they did not ask about deliberations, without filing this motion. However, due to the unique nature of this case, undersigned counsel erred on the side of caution and filed this motion before doing so.

ensuring that the grand jurors performed their appointed task enhances their role. Therefore, while admissions and communications among grand jurors are privileged (O.C.G.A. § 15-12-73), that privilege is not absolute. *See* O.C.G.A. § 15-12-72. In order to assert the provisions of O.C.G.A. § 15-12-72, it would seem that the defense must make a good faith showing that there exists the reasonable possibility that violations occurred during the grand jury proceedings as discussed herein (e.g., grand jurors did not read the indictment). If the prosecution is allowed to bar defense counsel from asking procedural questions of the grand jurors, defense counsel would never be able to investigate or challenge the validity of an indictment. Accordingly, the herein proposed course of action is not prohibited under Georgia law.

Counsel will not ask any questions of the grand jurors which are prohibited under Georgia law. Counsel (or a representative of counsel) will identify themselves; state who they are representing; their purpose in contacting the grand juror(s); provide counsel's contact information; and, if the grand juror consents, ask the appropriate questions.

WHEREFORE, for the foregoing reasons, Mr. Chesebro respectfully asks this Honorable Court to allow undersigned counsel to interview the grand jurors on a voluntary basis as authorized under Georgia Law.

This the 28th day of August 2023.

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CERTIFICATE OF SERVICE

The above ***MOTION TO SPEAK WITH GRAND JURORS TO DETERMINE WHETHER THE INDICTMENT WAS PROCURED IN SUBSTANTIAL COMPLIANCE WITH REQUIRED SAFEGUARDS FOR THE ACCUSED'S RIGHTS*** has been served, this day, upon the following, by e-filing upon all parties:

This the 28th day of August 2023.

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