FULTON COUNTY SUPERIOR COURT
STATE OF GEORGIA

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

MOTION TO SUPPRESS EVIDENCE OBTAINED IN VIOLATION OF O.C.G.A § 17-5-32

COMES NOW, Kenneth Chesebro, by and through undersigned counsel, pursuant to O.C.G.A. § 17-5-32(d), and asks this Honorable Court to exclude and suppress any evidentiary documents that were obtained via search warrants in violation of O.C.G.A. § 17-5-32(c). In support of his request Mr. Chesebro shows as follows:

PROPOSED FINDINGS OF FACT

On July 20, 2023, Fulton County Superior Court Judge Dempsey signed a search warrant for Mr. Chesebro's MSN email account. This search warrant was presented to Judge Dempsey by Fulton County District Attorney's Office Senior Investigator Trina Swanson-Lucas. Mr. Chesebro was subsequently indicted on August 14, 2023.

Two facts stand out as important, and fatal to the search warrant. First, Section 17-5-32(c) authorizes the use of warrants to search and seize attorney documents where "there is probable cause to believe that documentary evidence will be destroyed or secreted if a search warrant is not issued," yet on the date the warrant issued there existed no such concern, because months earlier Microsoft had archived all the e-mails in

question, pursuant to a preservation order.[1] Second, despite the detailed provisions of Section 17-5-32(c)(4), designed to minimize the intrusiveness of a search of an attorney's documents, by involving a person "who appears to have possession or control of the items sought," none of the three lawyers representing Mr. Chesebro (Adam Kaufmann, Scott Grubman, and Manny Arora) was ever contacted to schedule a hearing for review of the obtained documents in order to minimize review of documents falling outside the scope of the warrant, and to ensure that there would be no review by prosecutors of documents presumptively protected by the attorney-client privilege or work-product doctrine, absent a determination by the Court regarding whether there was a basis for piercing privilege.

CITATION TO AUTHORITY AND ARGUMENT

O.C.G.A § 17-5-32 is the controlling statute for search warrants pertaining to documentary evidence in the possession or custody of attorneys. It is clear that the Legislature intended to authorize the use of search warrants directed at attorneys only when proceeding by way of subpoena carries a risk of the evidence being destroyed or secreted. The Legislature also intended to provide an additional layer of protection for attorneys, by requiring the use of a special master. In doing so, the Legislature created a two-pronged system to ensure that attorneys are able to maintain attorney–client privilege and protected work product without needlessly interrupting an ongoing investigation. The system so created outlines a plan in which "[a]t the time the warrant is issued[,] the court shall appoint a special master to accompany the person who will

[1] *See* Preservation Letter, Attach. A.

serve the warrant." O.C.G.A. § 17-5-32(c)(1). "Upon service of the warrant, the special master shall inform the party served of the specific items being sought and that the party shall have the opportunity to provide the items requested." *Id.* The statute also provides:

> If the party who has been served states that an item or items should not be disclosed, such items shall be sealed by the Special Master and taken to the superior court for a hearing. At the hearing[,] the party whose premises has been searched shall be entitled to raise any issues which may be raised pursuant to O.C.G.A. § 17-5-30 as well as claims that the item or items are privileged or claims that the item or items are inadmissible because they were obtained in violation of the Code section.

O.C.G.A § 17-5-32(c)(2).

Finally, Section 17-5-32(d) states that "evidence obtained in violation of this Code section **shall** be excluded and suppressed from the prosecution's case-in-chief or in rebuttal, and such evidence **shall not be** admissible either as substantive evidence or for impeachment purposes" (emphasis added).

Here, the search warrant was drafted and issued to Microsoft by an investigator of the Fulton County District Attorney's Office. Significantly, the warrant specifies that Microsoft is to send the requested information to a ***filter team*** within the District Attorney's Office. *See* Search Warrant at 2 (Attach. B). [2] It is striking that the information was first sent to a filter team, which is an independent group whose sole purpose is to identify and separate privileged information within the seized items. This is analogous to the provisions of Section 17-5-32(c) which require that a special master be appointed

[2] The warrant further identifies Lester Tate of Cartersville, Georgia as the recipient on behalf of the Filter Team. *See* Search Warrant, Attach. B.

to hear any claims regarding privilege and to conduct the search without the participation of law enforcement or the prosecutor serving the warrant. Thus, it is clear that the District Attorney's Office was aware of the requirements of Section 17-5-32 and drafted its search warrant in an effort to appear that it was complying with the statute.

However, the search warrant does not actually comply with the statute. Here, the search warrant failed to appoint a special master to accompany the person who served the warrant, or even notify Mr. Chesebro or any counsel for him of the items being sought under the search warrant. *See* O.C.G.A. § 17-5-32(c)(1). Indeed, no qualified special master accompanied the person serving the warrant or notified anyone for the defense.[3]

Further, it is apparent from the affidavit attached to the search warrant that the

[3] There is no basis for the District Attorney to suggest that the procedures set out in Section 17-5-32(c) to minimize the intrusiveness of the search of an attorney's documents can be dispensed with on the theory that Mr. Chesebro was a "suspect." Mr. Chesebro was one of dozens of witnesses who waived objection to appearing before the special grand jury, and prior to the indictment the District Attorney's Office never gave any indication that he was regarded as a suspect, despite the fact that it did send formal target letters to co-defendants and unindicted co-conspirators in this case. *See* Dennis Aftergut et al., *Why the "Target Letters" Fani Willis Sent Out in Her Trump Probe Are Such a Big Deal*, SLATE (July 19, 2022, 6:53 PM), https://slate.com/news-and-politics/2022/07/fani-willis-trump-probe-target-letters-rudy-ouch.html. Further, whether or not an attorney is a suspect is irrelevant if the factual predicate set out by the Legislature for authorizing *any* warrant for an attorney's documents has not been met: that "there is probable cause to believe that documentary evidence will be destroyed or secreted if a search warrant is not issued . . . ." O.C.G.A. § 17-5-32(c). Here there was no probable cause to believe the e-mails, which had been archived off cloud storage by Microsoft months earlier, would be at risk if a search warrant did not issue. Because the statute's factual predicate for issuing a warrant for an attorney's documents could not be met, the proper course was for the District Attorney's Office to subpoena the documents from Microsoft, giving Mr. Chesebro's counsel notice of the subpoena.

Fulton County District Attorney's Office already had access to several emails from Mr. Chesebro that are undeniably protected under attorney–client privilege. For example, the affidavit specifically references an e-mail Mr. Chesebro sent to counsel for the Trump Campaign, Mr. Rudolph Giuliani. *See* Search Warrant Aff. & Appl. (Attach. B) at 7, ¶ 11. These kinds of communications are the exact type of communications that O.C.G.A § 17-5-32 is meant to protect. It is obvious that the Fulton County District Attorney's Office understood this because it implemented a filter team to review the warrant returns. Despite that, the State has backdoored its way into protected communications, and then used those same protected communications as a means to obtain further protected documents. This is in direct conflict with the Legislature's careful articulation of when a warrant may issue to obtain an attorney's documents, and what procedures must be employed, when such a warrant does issue, to minimize the intrusiveness of the search, under O.C.G.A § 17-5-32.

Upon receiving the returns of the warrant, the filter team never gave Mr. Chesebro or his counsel the opportunity to state that an item or items should not be disclosed due to privilege. No such items have been sealed, and no hearing has been provided as required by the statute. The search warrant and its service are therefore defective, and the seizure — and any subsequent search of the requested materials — are illegal.

Even setting aside the statutory dictates, what happened here following the seizure of the e-mails from Microsoft can hardly be termed a "reasonable" search within the meaning of the Fourth Amendment. Nobody is permitted to review privileged information other than a neutral and detached judge whose task is to ensure that

privileged information is not shared with any law enforcement or prosecuting agency. *See generally In re Search Warrant Issued June 13, 2019*, 942 F.3d 159 (4th Cir. 2019); *In re Search Warrants*, 2021 WL 5917983, No. 1:21-CV-04968-SDG (N.D. Ga. Dec. 15, 2021); *In re Sealed Search Warrant & Application for Warrant*, 11 F.4th 1235 (11th Cir. 2021).[4]

The prosecution's half-hearted attempt here to disguise its search warrant as compliant with O.C.G.A. § 17-5-32 is hardly the first sign of trouble on this front. The Fulton County District Attorney's Office had already violated this Code section in another case less than two months before the search warrant here was issued.[5] There can be little doubt that the Office will continue to violate the statute in future cases unless and until a judge applies the remedy for such conduct identified by the Legislature: exclusion of the improperly obtained evidence.

For these reasons, the warrant is defective, and the search and seizure predicated thereon is illegal. Pursuant to O.C.G.A § 17-5-32(d) and § 17-5-30, Mr. Chesebro prays that the Court suppress and exclude any evidence derived from the search warrant.

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[4] If any law enforcement officer or member of the prosecution team has reviewed any privileged information pending a decision in this matter, that should immediately be disclosed to the Court, and the person who has reviewed any privileged information should be disqualified from any participation in the case, and warned that if the person discloses what was reviewed, it will further taint other members of the prosecution team and subject the person to sanctions from the Court.

[5] In May 2023, the Fulton County District Attorney's Office seized a computer belonging to a defense attorney in the YSL RICO case without complying with O.C.G.A. § 17-5-32. A judge later allowed a second search, ostensibly in compliance with the statute, to stand after prosecutors obtained a new warrant after the first search was declared unlawful. *See* Shaddi Abusaid, *YSL Case: Judge Allows Search of Defense Attorney's Laptop*, ATLANTA J.-CONST. (Aug. 11, 2023), https://www.ajc.com/news/crime/ysl-case-judge-allows-search-of-defense-attorneys-laptop/XA7D322CFJEXNMMPU6UB6N6H4Y.

WHEREFORE, Mr. Chesebro requests that this Honorable Court grant this motion and suppress and exclude any evidence obtained through the defective search warrant in violation of O.C.G.A. § 17-5-32.

Respectfully submitted, this the 21st 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 Suppress Evidence Obtained in Violation of O.C.G.A § 17-5-32*** via the e-filing system.

This the 21st day of September, 2023.

/s/ Scott R. Grubman
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