

FULTON COUNTY SUPERIOR COURT
STATE OF GEORGIA

STATE OF GEORGIA,

v.

KENNETH CHESEBRO *ET AL.*,

DEFENDANTS.

CASE No. 23SC188947

JUDGE MCAFEE

MOTION TO DISMISS THE INDICTMENT UNDER O.C.G.A. § 16-3-20(5) & (6)

COMES NOW, Kenneth Chesebro, by and through undersigned counsel, and asks this Honorable Court to dismiss the indictment or grant him immunity from prosecution under the provisions of O.C.G.A. § 16-3-20(5) and (6). In support thereof, Mr. Chesebro shows this Honorable Court as follows:

1.

O.C.G.A. § 16-3-20 states that “[t]he fact that a person’s conduct is justified is a defense to prosecution for any crime based on that conduct.”

2.

Under O.C.G.A. § 16-3-20(5), a defendant can assert a defense of justification to a crime “[w]hen the person’s conduct is justified for *any* other reason under the laws of this state.” (emphasis added).

3.

O.C.G.A. § 16-3-20(6) also authorizes a justification defense “[i]n *all* other circumstances which stand upon the same footing of reason and justice as those enumerated in this article.” (emphasis added).

4.

These catch-all provisions are akin to the residual hearsay exception found in O.C.G.A. § 24-8-807. Although the justification defense is generally found in instances of violent crime, it is not limited to those circumstances. *See Tarvestad v. State*, 261 Ga. 605 (1991) (justification defense allowed where defendant was charged with driving without a license); O.C.G.A. § 16-3-20(1) (stating that entrapment, O.C.G.A. § 16-3-25, is a justification defense).

5.

Mr. Chesebro is alleged to have acted in ways that interfered with Georgia's rules, processes, and procedures of determining its electors for the 2020 presidential election. However, every action undertaken by Mr. Chesebro, however limited, was justified under Georgia and Federal law.

6.

Mr. Chesebro, being an expert in constitutional law, acted within his capacity as a lawyer in researching and finding precedents in order to form a legal opinion which was then supplied to his client, the Trump Campaign.

7.

Nothing about Mr. Chesebro's conduct falls outside the bounds of what lawyers do on a daily basis; researching the law in order to find solutions that address their clients particularized needs.¹

8.

¹ Further, Mr. Chesebro is likely equally protected under O.C.G.A. § 16-3-5.

A defendant asserting a justification defense acknowledges that a jury could find that he engaged in the conduct alleged in the indictment (here, writing legal memos and sending emails), but asks the jury to conclude that his conduct was justified. *McClure v. State*, 306 Ga. 856 (2019).

9.

Here, much like in *McClure*, there is no dispute that Mr. Chesebro drafted the legal memos in question. But also similar to *McClure*, Mr. Chesebro alleges that he was justified in writing these memos and emails because he was fulfilling his duty to his client as an attorney.

10.

The State alleges that Mr. Chesebro's legal advice, which was provided in his memos and emails, was in violation of the Electoral Count Act (ECA).² Quite to the contrary, not only was all the advice that Mr. Chesebro provided based on his legal research and good faith conclusions therefrom, but the ECA actually expressly contemplates *and permits* the use of alternate electors. 3 U.S.C. § 15.³ Even assuming, however, that Mr. Chesebro was advocating a novel legal position, criminalizing this behavior would stymie the long-held practice of attorneys advocating for novel legal positions. If the Court were to permit the State to prosecute individuals for writing a

² The Electoral Count Act is the statutory provision that allows states to conduct elections as they see fit.

³ The Electoral Count Act was amended in 2022. This brief cites the pre-2022 version of the Electoral Count Act, which is the version applicable to this case.

novel, controversial, or even incorrect interpretation of an abstruse law, then student law reviews and law journals everywhere would suddenly find themselves in need of staff.

11.

Here, Mr. Chesebro acted as any attorney in his position would; he utilized his expertise and legal acumen to present a good faith solution to a client using precedent and research. Even assuming *arguendo* that Mr. Chesebro's analysis pushed on the bounds of the law (which, to be clear, it did not given the ECA's language cited above) this behavior would not be outside the confines of any lawyer advocating for new law or precedent.

12.

The popularity or lack thereof as to any legal position taken by a lawyer should not be determinative as to whether a prosecutor can arbitrarily pick and choose which acts he or she wants to make criminal.

13.

Mr. Chesebro wrote legal memoranda and emails based on his experience, research, and good faith understanding of the law. His conduct was justified in satisfying his duties as an attorney.

WHEREFORE, Mr. Chesebro requests that this Honorable Court dismiss the indictment or grant immunity from prosecution under O.C.G.A. § 16-3-20(5) and (6).

Respectfully submitted, this the 12th day of September, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served, via U.S. Mail, a copy of the within and foregoing **MOTION TO DISMISS THE INDICTMENT UNDER O.C.G.A. § 16-3-20(5) & (6)** via the e-filing system.

This the 12th day of September, 2023.

/s/ Scott R. Grubman
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