IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	**INDICTMENT NO.**
v.	)	**22SC183572**
	)	
SHANNON STILLWELL,	)	**JUDGE WHITAKER**
	)	
Defendant.	)	

ORDER ON DEFENDANT STILLWELL'S RENEWED MOTION FOR FAIR AND CONSTITUTIONAL TRIAL

Defendant Stillwell raises numerous assertions of "error, impropriety, prosecutorial misconduct, and judicial partiality" which he asserts have resulted in a denial of his Constitutional rights to Due Process and a fair trial. The pertinent determination is whether such events, if they occurred as alleged, warrant a mistrial with prejudice, dismissal of the indictment with prejudice (which would have the same effect), or disqualification of the prosecutors.

Claim 1: A plague of discovery violations, missing police reports, and Brady violations. ¶ 6.

Discovery is being addressed. This Court has ordered the State to timely produce all discovery and undertake a concerted effort to secure and provide all police reports, including asking current APD personnel with specificity to search for and produce reports on the case.

As recently as the court proceedings of Friday, August 1, 2024, the Court confirmed the State's understanding that Brady obligations include the disclosure of material impeachment items and reminded the State of its continuing obligations under Brady. The State represented to the Court that it has fulfilled all its Brady obligations. The Court will address remedial Brady action later in this order.

Claim 2: Prosecutorial failure to follow Court orders, making of specious allegations against defense counsel and counsel for a witness, and lack of candor to the Court. ¶ ¶ 7, 10, 22, 23.

Any past failure of the prosecutors to follow orders of the Court is a matter of record. Aside from the broad assertion of a denial of Defendant's rights to Due Process and a fair trial, no specifics establishing this assertion and no claim of resulting legal error is alleged. Any potential error stemming from prosecutorial failure to follow court orders may be addressed on motion for new trial and/or direct appeal, assuming any conviction.

Any specious allegations against defense counsel, counsel for a witness, or lack of candor with the Court is – at minimum – extremely unfortunate.[1] These items do not, however, establish a denial of Defendants' rights to Due Process or a fair trial,[2] and the Court at present declines to impose the extreme sanction of removal of any offending prosecutors.

Claim 3: Improper evidentiary rulings by the predecessor judge. ¶ 8, 9 c.

"A defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." Peoples v. State, 295 Ga. 44, 55, 757 S.E.2d 646 (2014) (cleaned up, cits. omitted). "Evidentiary error, which involves mistakes under Georgia's procedural rules and evidence law rather than any constitutional violation," id. can be addressed in post-trial review.

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[1] **The Court reminds all counsel that every Georgia attorney is bound by our Rules of Professional Conduct and owes a duty of candor to the Court. These ethical and professional obligations should be scrupulously honored, and prosecutors, above all, should endeavor to comport themselves so as to be above reproach on such matters.** The Court understands that it has the authority to sanction counsel for violations of the Rules of Professional Conduct that occur during and impact on a case before this Court. The Court declines that invitation at present. However, any future persistent failure to abide by the Rules of Professional Conduct or lack of candor with the Court may trigger the extreme sanction of removal from this case.

[2] The State's June 7, 2024 motion for immunity and compelled testimony of Copeland states: "[O]n Thursday, June 6, 2024, after an encounter with defense team members and members of the Fulton County District Attorney's Office, Copeland stated to an investigator and to an attorney with the Office of the Fulton County District Attorney that Copeland might attempt to plead the Fifth in order to avoid testifying against members of YSL." Motion ¶ XI. Even assuming that this is a willful misrepresentation, as opposed to inartful drafting or a misunderstanding, the gravamen of the representation is that Copeland had indicated he might plead the Fifth to avoid testifying in this trial. The sequence of (alleged) events is not the material aspect of the motion.

Claim 4: Mistreatment of Defendants and their counsel by the predecessor judge. ¶ 9 a, b, d, e, h.

Aside from a blanket assertion, the motion does not detail any alleged mistreatment of Defendants.

The alleged mistreatment of defense counsel detailed in ¶ 9 a, e, and h is not alleged to have occurred in front of the jury and, even accepted at face value, would not rise to the level of a violation of Defendants' Due Process or fair trial rights. As to remedies, the predecessor judge has been recused, and the contempt issue outlined in ¶ 9 h is moot.

Turning to alleged mistreatment in front of the jury, ¶ 9 b and d, a judge has broad latitude in determining how to control the courtroom, and directing attorneys to "sit down" when overruling objections falls within that latitude. This Court will give a remedial instruction directing the jury to disregard any disparaging remarks about counsel.

Claim 5: Improprieties in and illegality of the June 7, 2024 ex parte conference. ¶ ¶ 20-27.

In open court on June 7, 2024, the prosecution requested an ex parte conference with the Court. Jun 7, 2024 Transcript (T), p. 94. The defense was therefore on notice of this request. The defense also knew that the request was not to secure immunity for Copeland, as the immunity order had been signed in open court earlier in the same day's proceedings. Even assuming a right to be present for this June 7, 2024 conference, no one on the defense team objected to the request or sought more information about it, thereby waiving any right to be present for that conference. See, e.g., Nesby v. State, 310 Ga. 757, 761, 853 S.E.2d 631, 634 (2021) (citing Hanifa v. State, 269 Ga. 797, 807-808 (6) (505 SE2d 731) (1998) for the proposition that "defendant waived right to be present by failing to object after being informed of trial Judge's meeting with the jury outside presence of defendant and counsel."

As for topic of this ex parte conference, Defendant assigns nefarious intent to prosecutor Love's and Hylton's representations about their interactions with Copeland's main counsel, Jonathan Melnick.[3] The Court at this point declines the invitation to so view their representations but refers the prosecutors to its footnote 1 herein.

Defendant complains that comments by the predecessor judge during this conference[4] reveal his partiality to the State. Pretermitting the questionable accurateness of such characterizations, this issue has been mooted by the recusal of that judge from the case.

Claim 6: Illegality of the June 10, 2024 ex parte meeting. ¶ ¶ 11-19, 24-27.

On June 10, 2024, at the behest of prosecutor Love, the predecessor judge held an on-the-record in chambers meeting with Love and stand-in counsel for Copeland, Kayla Bumpus. Jun. 7, 2024 Transcript of ex parte (XPT), p. 3-22.[5] Following a recess at which time Love departed the meeting, Copeland and prosecutor Hylton joined the meeting. Defendant's motion raises several challenges to this ex parte meeting: did Defendant have a right to be present, did the ex parte meeting amount to coercion of Copeland's testimony, and did any Brady violations occur.

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[3] On August 5, 2024, Melnick supplemented the record with a statement in his place as to his representation of Copeland and addressed the asserted conflict of interest.

[4] The predecessor judge's remarks regarding "outside agitators" are virtually identical to the remarks he had just made on the same topic in open court – remarks which he addressed to *all* counsel, 6/7/24 T. at 63, 65, 66), and which could not therefore logically include defense counsel.

[5] The defense also raises the specter of another ex parte conversation between the prosecution and the predecessor judge (or that a portion of the June 10, 2024 ex parte meeting was not transcribed) because the predecessor judge seemed to know that the prosecution had a list of questions for Copeland despite there being no prior mention of such a list during the ex parte meeting. This knowledge is easily accounted for: the prosecutors had specifically referenced such a list of questions, reviewed by Ms. Hylton with Copeland, on the record during the prior Friday's proceedings. 6/7/24 T. at 62. Thus, the innocuous source of the predecessor judge's knowledge.

Did Defendant have a right to be present?

Defendant is correct that this meeting was about more than just the parameters of Copeland's immunity and whether he understood its potential ramifications. The initial stage of the meeting, before the first break, centered on the prosecution's concern with whether Copeland's main counsel was laboring under a conflict of interest[6] and with the logistics of handling Copeland's testimony with stand-in counsel. But because these topics were all ancillary to Copeland's immunity grant, the topic of the meeting remained at its core, and as asserted by the prosecution, Copeland's immunity grant.

Because the meeting dealt with Copeland's immunity grant and its ancillary issues, it was not a critical state of the trial at which the Defendant had a right to be present. See Snyder v. Comm. of Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934) (criminal defendant has a right to be present when his presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend himself against the charge" but not when "his presence would be useless or its benefit but a shadow"); United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) ("the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only").[7]

Defendant is correct that there are differences between the meeting in this case and the meeting in King v. State, 273 Ga. 258, 539 S.E.2d 783 (2000), cited by the State. For instance, the meeting in King was to secure immunity for a key prosecution witness, and the defense was

[6] This Court sympathizes with Mr. Melnick's understandable indignation at having his professionalism and his loyalties to his client questioned. The Court likewise appreciates defense counsel's umbrage.

[7] The issue of Brady material being generated during this ex parte meeting but not produced will be addressed below.
As to the allegation made orally on Friday, August 2, 2024 that Brady material was revealed to the prosecution in an off-the-record conference between Hylton, Bumpus, and Copeland during a break in the ex parte meeting, see the Court's separate Order thereon.

aware that the immunity hearing was occurring. Here the defense was not given notice of the meeting, and immunity had already been granted to a key prosecution witness, so the topic was not whether immunity was in the public interest. Instead, its topics were the adequacy of the witness' legal representation and logistics about stand-in representation, as well as ensuring the witness correctly comprehended the meaning and impact of the immunity grant, what would and would not amount to contempt of the order granting immunity and compelling his testimony, and the potential consequences of failure to comply with the order.

But the State's reliance on King does not demand that its facts be on all fours. The legal import of King for this Claim is that because a defendant's rights are not the subject matter under consideration in proceedings surrounding a witness immunity grant, a defendant has no right to be present for discussions with the tribunal surrounding witness immunity. The fact that here, discussions included what testimony would subject the witness to a charge of perjury; what would subject him to punishment for contempt of the order compelling his testimony; and what that sanction might entail (even if incorrect) does not change the analysis. Defendant's rights were still not the subject matter under consideration. See also State v. Lowery, 308 Kan. 1183, 1212-1214, 427 P.3d 865 (2018) (no right to be present at hearing to compel witness testimony pursuant to immunity grant);[8] Chestnut v. New York, No. 06-CV-2172 (JS), 2009 U.S. Dist. LEXIS 110208, at *11-14 (II A) (E.D.N.Y. Nov. 24, 2009) (ex parte meeting at trial court's behest between court, prosecutor, and counsel for witness, initiated after defendant and his attorney had left the courtroom during a recess at the close of the witness' direct examination, and held to ensure

[8] Lowery found that because the hearing there also included discussion and ruling on the *defendant's* motion (a midtrial motion in limine regarding the witness using "street names' during testimony), absence of the defense violated defendant's statutory right to be present, though any constitutional error was waived. Here, there was no ex parte hearing or discussion of any defense motions. This analysis confirms that the key to whether the defendant has a right to be present for witness immunity proceedings is whether for some reason the *defendant's* rights are *also* a subject matter under consideration.

witness understood his deal with the prosecution and that he was not unknowingly incriminating himself and understood his constitutional rights held to be an "ancillary proceeding dealing only with the rights of the witness" at which defendant had no right to be present.

Was the witness' testimony coerced?

Separate from any defense right to be present for ancillary proceedings concerning witness immunity, Defendant has a right to a trial free of coerced testimony. Defendant asserts that certain arguably inaccurate representations made by the prosecutors and the predecessor judge to Copeland about the law of derivative use immunity, the applicable statute of limitations (relating to what crime or crimes, the defense does not specify), and the length of his possible incarceration for contempt coerced Copeland into testifying.

Webb v. Texas, 409 U.S. 95, 95-96, 93 S. Ct. 351, 34 L.Ed.2d 330 (1972), is the touchstone for evaluating claims of coercion by the trial court of a witness' testimony. Archer v. State, 383 Md. 329, 335-351, 859 A.2d 210 (2004), provides another example of a trial court overstepping its proper role of neutral arbiter and rendering involuntary a witness' determination whether to testify.

Here, Copeland had the benefit of counsel; the predecessor judge did not on the whole use intimidating rhetoric, but rather sought to ensure that Copeland understood the nuances of the decision he had to make; and he explained that many of the decisions about what could happen to Copeland were not his to make but were up to the prosecutors. Still, some of the information provided to Copeland may have been inaccurate.

While it is likely that Copeland was not induced by any inadvertent or other inaccuracy to testify, the cleaner approach is simply to pretermit this issue, acknowledging past inaccuracies,

and advise Copeland anew. This is the course that the Court has proposed, and the parties have affirmed its efficacy. [9]

Was there a Brady violation?

This has been a long-running and multi-faceted proceeding. Challenges have been myriad and formidable. Frustrations may have been mounting while fortitude was waning. And a needle in a haystack is not only sometimes difficult to find but also easily overlooked. The Court does not attribute bad faith to anyone on this issue. And yet, as soon as Copeland joins the June 10, 2024 in-chambers ex parte proceeding, he states, "I have never been truthful a day in my life until I just made this statement right now." XPT 24. Copeland may have little credibility. He may speak in hyperbole. But the fact remains that for a defense attorney, this nugget by a key State's witness is gold. So when the prosecution not only did not reduce this statement to writing and produce it, but also asserted in court filings that the defense had no entitlement to know the contents of the ex parte proceedings, this amounted to suppression, whether willful or otherwise, of what was objectively Brady impeachment material.

The defense now knows of this statement and indeed of all of what occurred during the June 10, 2024 ex parte meeting. The contents of the meeting were ultimately revealed during the course of trial and in time for the defense to utilize it. So the failure to produce/suppression of this information does not – technically – amount to a Brady violation. But the fact that a violation of a defendant's Constitutional rights has been averted does not, under these circumstances, provide cause for celebration.

[9] Copeland has since been recalled into open court on August 6, 2024, and in the presence of his counsel Melnick (who also privately consulted with and advised Copeland) was provided clarifying and correct information on matters potentially impacting his choice whether or not to testify. All parties were present and consulted with the Court prior to Copeland being readvised.

What it does provide is cause for sober reflection and an examination of processes, procedures, and approaches that permitted this likely inadvertent but nonetheless serious Brady lapse to occur.

Defendant seeks as a sanction the disqualification of the State's two lead prosecutors. Because this does not appear to the Court to have been a purposeful violation, but rather a negligent overlooking of the impeachment value of Copeland's in chambers statement, the Court does not order their disqualification. At the same time, the Court is cognizant that Defendant's liberty, as well as the liberty of his co-defendants at this trial, is at stake; that the prosecutors involved are knowledgeable and experienced; and that this is not the first allegation of prosecutorial misconduct in this case. The Court therefore orders, as a remedial measure, that the entire prosecution team working this trial submit to training on Brady and other professional obligations of a prosecutor. This training will consist of a video replay of training on this topic previously presented by the Prosecuting Attorneys' Council of Georgia. The Court will provide the video, and the viewing will occur under the direction of the Court.

SO ORDERED this 8th day of August 2024.

Judge Paige Reese Whitaker
Superior Court of Fulton County

Service via e-filing system.