

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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v.

KENNETH JOHN CHESEBRO,
CATHLEEN ALSTON LATHAM,
DAVID JAMES SHAFER, and
RAY STALLINGS SMITH III.

Indictment No.
23SC188947

**ORDER ON DEFENDANT CHESEBRO'S
MOTION TO DISMISS INDICTMENT FOR FAILURE TO COMPLY**

Defendant Chesebro now seeks dismissal of the indictment because the District Attorney Office's neglected to file the oath of Special Assistant District Attorney ("ADA") Nathan Wade in alleged violation of O.C.G.A. § 45-3-7 ("Before proceeding to act, all deputies shall take the same oaths as their principals take and the oaths shall be filed and entered on the minutes of the same office with the same endorsement thereon").¹ *See also Nave v. State*, 171 Ga. App. 165, 166 (1984) (holding that Assistant District Attorneys are considered "deputies" requiring the same oath as the District Attorney).

First, the motion fails to establish that this code section is even relevant to Special ADA Wade. Explicitly, the requirements "shall not apply to any deputy who may be employed in particular cases only." O.C.G.A. § 45-3-7; *Middleton v. State*, 316 Ga. 808, 809 (2023) (recognizing that deputies sworn in for a "more limited role" are "exempted" from having to file and enter the record of their oath). As the motion itself proffers, the District Attorney's Office hired Special ADA Wade for the purpose of assisting the Special Purpose Grand Jury and prosecuting the matter that led to


¹ Adopted by Defendants Latham, Shafer, and Smith. (Latham Doc. 48; Shafer Doc. 53; Smith Doc. 53). The Court appreciates Defendant Chesebro's recognition that he filed this motion outside the case scheduling order deadline, but will allow an exception and address the merits due to the representation that he only recently obtained the necessary records, and because the motion is so easily dispatched.

the indictment in this case. He does not appear to have been given a general assignment of any kind. Defendant's motion recognizes this exception, but then blithely moves on without adequately explaining why it should not apply, or why this exception would not prevail as the more specific statute over any other statutory provisions referencing a deputies' oath. *See Smallwood v. State*, 310 Ga. 445, 452 (2020) ("the canon of construction that a more specific statute prevails over a general statute resolves any ambiguity between the two statutes").

Even assuming Special ADA Wade has not been employed to handle "particular cases only," O.C.G.A. § 45-3-10 provides that "[t]he official acts of an officer shall be valid regardless of his omission to take and file the oath, except in cases where so specially declared." One might think distinguishing this safe harbor provision would be central to the Defendant's argument. One would be wrong. The Defendant's citation is tucked away in a footnote with only the unsupported assertion that "prosecuting a criminal case is one such specially declared situation." The Court has not been provided, nor located, any authority to support this claim. And O.C.G.A. § 45-3-10 echoes the "de facto" officer theory recognized early in our Supreme Court's existence. *See Hinton v. Lindsay*, 20 Ga. 746, 749 (1856) ("An officer de facto is said to be one who exercises the duties of an office under color of an appointment or election to that office."); *Beck v. State*, 286 Ga. App. 553, 556 (2007) ("The validity of a de facto officer's acts is so well settled that it is embodied in the Code as part of OCGA § 45-2-1 (the acts of a person ineligible to hold public office 'shall be valid as the acts of an officer de facto')"); *State v. Giangregorio*, 181 Ga. App. 324, 325 (1986) (Beasley, J. concurring specially) ("It is without dispute that Toles was acting as a deputy sheriff at least de facto when he made the arrest. That being the case, the arrest was legal insofar as its effect on defendant is concerned."). Despite the lack of filing, Special ADA Wade's acts while in office would nevertheless be valid as a de facto officer. *Keith v. State*, 279 Ga. App. 819, 828 (2006).

And if this parrot of a motion is somehow not yet dead, the Defendant has failed to establish how Special ADA Wade’s actions resulted in prejudice, *i.e.*, how his assignment singlehandedly changed any specific actions taken during the investigation or resulted in the true bill of indictment. *See Martin v. State*, 195 Ga. App. 548, 551 (1990) (requiring prejudice before remedying a purported officer disqualification). Nor has Defendant established a constitutional violation or structural defect in the grand jury process sufficient to justify outright dismissal. *See State v. Lampl*, 296 Ga. 892, 897 (2015) (“Unless expressly authorized by statute, [dismissal of an indictment] generally cannot be imposed absent a violation of a constitutional right” or when the structural protections of the grand jury have been compromised); *Olsen v. State*, 302 Ga. 288, 294 (2017) (“Dismissal of an indictment is an extreme sanction”). The motion is DENIED.

SO ORDERED, this 6th day of October, 2023.



Judge Scott McAfee
Superior Court of Fulton County
Atlanta Judicial Circuit