

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

THE STATE,)
 Petitioner,)
vs.) RE: INDICTMENT 16SC144430
))
COHEN et al.) JUDGE NEWKIRK

APPLICATION FOR EMERGENCY STAY OF DELIBERATIONS
BY THE DISTRICT ATTORNEY

PAUL L. HOWARD, JR.
DISTRICT ATTORNEY
ATLANTA JUDICIAL CIRCUIT
STATE BAR NO. 371088

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THE STATE,)
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APPLICATION FOR EMERGENCY STAY OF JURY DELIBERATIONS
BY THE DISTRICT ATTORNEY

COMES NOW the State of Georgia , through Paul L. Howard, Jr., District Attorney for the Atlanta Judicial Circuit, and hereby files its Application for Emergency Stay to **HALT FURTHER JURY DELIBERATIONS** and to **RECHARGE** the jury to correct a clearly erroneous instruction on the law of one-party consent. The State seeks to prohibit Judge Newkirk from giving a jury instruction which is a clearly erroneous statement of Georgia law about one-party consent to videotape without the consent of all persons depicted in the video. Instead, the State requests that Judge Newkirk give the jury instruction requested below, using the language from the Georgia Supreme Court's decision in a pretrial appeal in this very case.

1.

The state of the law at the time of defendant attorneys' advice was not doubtful

and did not authorize one-party consent to observe, photograph, or record the activities of another. ““OCGA § 16-11-62 was intended to protect all persons from an invasion of privacy.’ Pertinently, subsection (2) of that Code section contains the language, ‘without the consent of all persons observed,’ which the legislature has not included in subsection (1). ***The plain import of these words illustrates legislative intent that the consent required under subsection (2) is that of each individual observed.***” *Gavin v. State*, 292 Ga. App. 402, 404 (664 SE2d 797) (2008). *See also See Snider v. State*, 238 Ga. App. 55, 57 (1) (a) (516 SE2d 569) (1999) (finding appellant's contention that one does not reasonably expect privacy in one's own bedroom as not tenable).

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In the pretrial appeal from the grant of defendants’ demurrer, the Georgia Supreme Court *held*: “that the one-party-consent rule of OCGA § 16-11-66 (a) does not apply to eliminate the requirement for “all” persons to give their consent to be legally photographed or video recorded in a private place and out of the public view consistent with the requirements of OCGA § 16-11-62 (2). People of ordinary intelligence can understand that they can be found guilty of illegal surveillance if they use a device to secretly photograph or video record others in private places and out of the public view without the consent of all persons being photographed or video recorded, and neither OCGA § 16-11-62 (2) nor OCGA § 16-11-66 (a) encourages arbitrary or discriminatory enforcement of their respective provisions.”

State v. Cohen, 302 Ga. 616, 632, 807 S.E.2d 861, 874 (2017).

3.

That is the ONLY instruction Judge Newkirk should give in answer to the jury's question. "The adoption of a clearly erroneous jury instruction that entails a high probability of failure of a prosecution -- a failure the government could not then seek to remedy by appeal or otherwise -- constitutes the kind of extraordinary situation in which we are empowered to issue the writ of mandamus." *United States v. Wexler*, 31 F.3d 117, 129 (3d Cir. 1994).

4.

The State respectfully requests Judge Newkirk instruct the jury as follows:

The one-party-consent rule of OCGA § 16-11-66 (a) does not apply to eliminate the requirement for "all" persons to give their consent to be legally photographed or video recorded in a private place and out of the public view consistent with the requirements of OCGA § 16-11-62 (2). People of ordinary intelligence can understand that they can be found guilty of illegal surveillance if they use a device to secretly photograph or video record others in private places and out of the public view without the consent of all persons being photographed or video recorded."

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The denial of this emergency motion will be directly appealed to the Georgia Supreme Court.

RESPECTFULLY SUBMITTED, this 11th day April , 2018.

PAUL L. HOWARD, JR.
DISTRICT ATTORNEY
ATLANTA JUDICIAL CIRCUIT
BAR NO. 371088

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DEPUTY DISTRICT ATTORNEY
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ATLANTA JUDICIAL CIRCUIT
STATE BAR NO. 404898

CERTIFICATE OF SERVICE

This is to certify that I have served the foregoing Application for Emergency Stay on EACH DEFENDANT by handing THE SAME TO COUNSEL OF RECORD, IN OPEN COURT

Courtesy copy to Judge McBurney.

This the 11th day of April, 2018.

MARC A. MALLON
SENIOR ADA
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STATE BAR NO. 467735