

IN THE SUPERIOR COURT OF FULTON COUNTY  
 STATE OF GEORGIA

JAMES BURNS,	)	
Plaintiff	)	
	)	
v.	)	CASE NO. 2018CV309891
	)	
	)	
	)	Emergency Petition
	)	Hearing Requested
PAUL HOWARD,	)	
Defendant.	)	
	)	
	)	

EMERGENCY PETITION FOR A WRIT OF MANDAMUS

COMES NOW the Defendant, James Burns, and petitions the court to issue a writ of mandamus directing the Fulton County District Attorney Paul Howard to comply with his official duties as set out in O.C.G.A. §§ 17-7-52 and 45-11-4. This petition is based O.C.G.A. § 9-6-20, the ex post facto clause of the United States Constitution, Article I, Section 10, Clause 1; Article I, Section I, Paragraph X of the Constitution of the State of Georgia; and *State v. Lindsay*, 255 Ga. App. 464 (2002).

Pursuant to O.C.G.A. § 9-6-20, the Superior Court has a duty to issue a writ of mandamus in circumstances where there is no other specific legal remedy. A writ of mandamus is used to compel legal officials to due perform their official duties. See *Nesbitt v. Lewis*, 235 Ga. 477 (220 SE2d 7) (1975); *Harper v. Burgess*, 225 Ga. 420 (169 SE2d 297) (1969); *Ungar v. Mayor &c. of Savannah*, 224 Ga. 613 (163 SE2d 814) (1968). This action is appropriate in this case because there is no alternative remedy for Mr. Burns to prevent the Fulton County District Attorney Paul Howard from violating his rights in the upcoming grand jury presentation and once the presentation goes forward, those rights are forever lost. In support thereof, Mr. Burns

shows as follows:

1.

Plaintiff James Burns is a former police officer with the Atlanta Police Department.

2.

Defendant Paul Howard is the elected District Attorney of Fulton County.

3.

This court has jurisdiction to issue a Writ of Mandamus under O.C.G.A. § 9-6-20 *et seq.*

4.

Plaintiff was indicted on August 31, 2016 in relation to an incident which occurred on June 22, 2016. O.C.G.A. §§ 45-11-4 and 17-7-52 create rights for a public employees or officials to be provided notice of the grand jury presentment, to be present during the entire grand jury proceeding, and to be provided an opportunity to make a sworn statement not subject to examination. Defendant's position at the time of the August 31, 2016 presentment was that the July 1, 2016 amendments to O.C.G.A. §§ 45-11-4 and 17-7-52 would not apply because this alleged incident occurred prior to those amendments taking effect. (see e-mail exchange attached hereto as Exhibit A). After substantial litigation on separate issues, Defendant entered a Nolle Prosequi in the previous case on July 25, 2018.

5.

On August 15, 2018, Plaintiff received notice from Defendant which indicated that Defendant would convene a grand jury on September 5, 2018 to re-present charges based on the same incident with occurred on June 22, 2016 (see notice attached as Exhibit B). The August 15, 2018 notice indicates that Defendant no longer intend comply with the language of O.C.G.A. §§ 45-11-4 and 17-7-52 in effect on the date of the incident. Instead, Defendant contends O.C.G.A.

§§ 45-11-4 and 17-7-52 as amended on July 1, 2016 applies to the presentation scheduled for September 5, 2018.

6.

The July 1, 2016 amendment substantially changed the rights of public officials, such that a public official or employee accused no longer has a right to be present during the entire grand jury proceeding and any statement made by that official or employee is subject to cross examination.

7.

Counsel for Plaintiff conferred with Defendant through Assistant District Attorney Adam Abbate in an attempt to resolve this issue. ADA Abbate represented to counsel for Plaintiff that the official position of the Defendant is that the July 1, 2016 amendment applies to this indictment (see e-mail exchange attached hereto as Exhibit C).

8.

Denying Plaintiff the substantive rights conferred to him under O.C.G.A. §§ 17-7-52 and 45-11-4 on a retrospective basis would clearly violate Georgia statutory and constitutional law. There is a wealth of caselaw available on the retrospective application of laws. *See, e.g., Deal v. Coleman*, 294 Ga. 170 (2013), *Fulton County v. Action Outdoor Advertising*, 289 Ga. 347, 351 (2011); *Jackson County Bd. of Health v. Fugitt Constr., Inc.*, 270 Ga. 667 (1999); *Goldrush II v. City of Marietta*, 267 Ga. 683 (1997). Even where there is an explicit provision in the statute that the law should be retroactive (and in this case, there is not) the courts often find a constitutional violation when they are applied. Article I, section I, paragraph X of the Georgia Constitution prohibits *ex post facto* application of laws. Even further, directly on point to this issue is *State v. Lindsay*, 255 Ga.App. 464 (2002). There, even though it was an earlier amendment, the

provisions and changes were almost identical. The Court in *Lindsay* found that the retroactive application was in violation of the defendant's constitutional and statutory rights and explicitly found that the right for the defendant, a police officer, to be present and to give a statement without cross-examination were substantive rights afforded to him that could not be retroactively taken away.

9.

The District Attorney has a duty to attend on grand juries, advise them in relation to matters of law, swear and examine witnesses before them, and to draw up all indictments or presentments. O.C.G.A. § 15-18-6. Defendant's failure to comply with the rights established by O.C.G.A. §§ 45-11-4 and 17-7-52 constitutes an improper performance of Defendant's official duty as District Attorney. As there is no other legal remedy available to Plaintiff to enforce his legal right, a writ of mandamus must be issued to protect those rights. O.C.G.A. § 9-6-20.

10.

Emergency procedures pursuant to Uniform Superior Court Rule 6.7 are necessary for this motion because the grand jury is scheduled to convene on September 5, 2018. Without a hearing or order on this petition prior to the grand jury presentation, Plaintiff will lose his substantive rights as afforded to him by Georgia law and they cannot be regained in any subsequent proceedings.

WHEREFORE Plaintiff respectfully requests that the court grant an immediate hearing on this motion pursuant to Uniform Superior Court Rule 6.7 and require the Defendant to show cause why a mandamus should not be issued against him requiring him to follow the law in effect on June 22, 2016 as set out in O.C.G.A. §§ 45-11-4 and 17-7-52 for any future grand jury

presentation against Plaintiff based on the incident alleged to have occurred on June 22, 2016,  
and that on the hearing the mandamus may be made absolute.

Respectfully submitted,

s/Drew Findling  
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s/Marissa Goldberg  
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