

FULTON COUNTY SUPERIOR COURT
STATE OF GEORGIA

STATE OF GEORGIA,

V.

KENNETH CHESEBRO *ET AL.*,

DEFENDANTS.

CASE No. 23SC188947

JUDGE McAFEE

MOTION FOR SEVERANCE OF CO-DEFENDANTS AND TO SEVER COUNTS 1, 9, 11, 13, 15, 17 AND 19 FROM THE REMAINING COUNTS IN THE INDICTMENT

Mr. Chesebro is charged with a total of seven counts that allegedly occurred between the dates of November 4, 2020 through September 15, 2022.¹ The first count of the indictment involves Mr. Chesebro and 18 co-defendants. The charges against Mr. Chesebro are as follows:

Count 1: RICO;

Count 9: Conspiracy to Commit Impersonating a Public Officer;

Count 11: Conspiracy to Commit Forgery in the First Degree;

Count 13: Conspiracy to Commit False Statements and Writings;

Count 15: Conspiracy to Commit Filing False Documents;

Count 17: Conspiracy to Commit Forgery in the First Degree; and

Count 19: Conspiracy to Commit False Statements and Writings.

The remaining 34 counts of the indictment, many of which are of a similar nature to the crimes charged against Mr. Chesebro, do not involve Mr. Chesebro and are not relevant in the prosecution or defense of his trial. This Court has already issued a

¹ However, the relevant dates applicable to Mr. Chesebro's alleged conduct are December 6, 2020 through January 4, 2021.

scheduling order setting deadlines and a trial date that apply **only** to Mr. Chesebro and not to any co-defendant. Thus, because Mr. Chesebro is set to be tried separately, allowing the jury to see these counts would be prejudicial to Mr. Chesebro and insert unrelated matters into the trial.

ARGUMENT AND CITATION TO AUTHORITY

For clarity, Mr. Chesebro, at this time, is not seeking to sever the 7 counts against him from each other; rather, Mr. Chesebro is asking this Court to sever his trial and the 7 counts against him from the trial of his co-defendants including the 34 other counts for which Mr. Chesebro is **not** charged. Georgia courts hold that a defendant does not have a right to seek to sever a count that affects only a co-defendant where the defendant does not move to sever his trial from that of the co-defendant. *See Durden v. State*, 219 Ga. App. 732, 734 (1995). Thus, although this Court has already ordered that the trial date and case management deadlines for Mr. Chesebro do not apply to any co-defendant, Mr. Chesebro formally moves to sever his trial from that of his co-defendants in order to preserve his right to seek severance of the 34 counts with which he is not charged.

The seminal case in Georgia regarding when a severance of counts should be granted is *Dingler v. State*, 233 Ga. 462 (1975). In applying American Bar Association standards, the Georgia Supreme Court in *Dingler* held that a defendant has the right to sever charges that have been joined for trial **solely** on the ground that they were of the same or similar character. 233 Ga. at 463; *accord Stewart v. State*, 277 Ga. 138, 139 (2003); *Bolton v. State*, 258 Ga. App. 581, 582 (2002). “Otherwise, the court has the discretion to grant or deny severance based on what is necessary to achieve a fair determination of the defendant’s guilt or innocence of each offense.” *Bolton*, 258 Ga. App.

at 582. However,

that is not to say that severance will not lie when offenses are *not* joined solely because they are of the same or similar character. In that circumstance, severance may still be appropriate, although not mandated, because the trial court must determine whether the trier of fact will be able to fairly and intelligently judge each offense. . . .

. . . The fact that evidence of one offense would be admissible in a trial of another offense is a relevant consideration in determining whether to sever, . . . but it does not end the inquiry. A trial court must still determine if severance of the offenses would promote a fair determination of guilt or innocence as to each offense.

277 Ga. 138, 139–40 (2003) (emphasis in original) (internal citations omitted); *See also Jackson v. State*, 276 Ga. App. 77 (2005); *Sampler v. State*, 294 Ga. App. 174 (2008).

In other words, a court is required to sever the charges upon a defendant's motion if the charges' only connection is their mere similarity. *Cooper v. State*, 253 Ga. 736, 737 (1985). However, if offenses which are of a similar character are so strikingly similar as to evidence a common motive or bent of mind or a single transaction, scheme, or plan, then those offenses may be joined for trial. *See id.* (explaining that crimes which rise to the level of a pattern constitute parts of a single scheme or plan); *Heard v. State*, 287 Ga. 554, 558–59 (2010). In other words, severance is not mandatory when evidence of one offense can be admitted as similar transaction evidence for another offense. *See Green v. State*, 291 Ga. 287, 289 (2012); *Heck v. State*, 313 Ga. Ap. 571, 575 (2012).

Here, the 34 counts which Mr. Chesebro seeks to sever would not be admissible as similar transaction evidence on any of the counts against him because he is not alleged to have committed them. However, even if this Court disagrees that severance here is mandatory, this Court should still grant severance based on the interests of justice. In determining whether severance is necessary to promote a fair determination of the

defendant's guilt or innocence as to each offense, a trial court must determine whether—in light of the number of counts and the complexity of the evidence—a jury will be able to distinguish the evidence and apply the law intelligently to each count. See *Harrell v. State*, 297 Ga. 884, 889 (2015). In applying this test, the Court must consider the number of offenses charged, the complexity of the charges, the complexity of the evidence, whether the same evidence would be necessary and admissible in each count, and whether joining the counts in a single trial might confuse the jury or whether the jury would be unable to *fairly* parse the evidence and the law as to each count. See *Calhoun v. State*, 318 Ga. App. 835, 836 (2012); *Shabazz v. State*, 265 Ga. App. 64, 65 (2004).

Here, there are 41 total offenses charged in the indictment, but only 7 counts apply to Mr. Chesebro. Further, there are 19 total defendants: some who were federal officials, some state officials, some with defined roles in political campaigns, and others less so. The charges and the evidence are both clearly complex; the State here found it necessary to convene a special purpose grand jury for *eight* months to assist in its investigation before presenting the case to a regular grand jury. Of the seven charges that Mr. Chesebro faces, six allege separate conspiracies to commit various crimes. While the commission of those crimes are also charged, the set of co-defendants who face charges for those completed crimes are entirely different than the set of co-defendants who face the conspiracy counts for which Mr. Chesebro is also charged.²

² For example, Mr. Chesebro is charged with conspiracy to commit impersonating a public officer in Count 9 of the indictment along with co-defendants Donald Trump, Rudy Giuliani, John Eastman, Ray Smith, Robert Cheeley, and Michael Roman. Count 8 of the indictment charges three different co-defendants—David Shafer, Shawn Still, and Cathleen Latham—with the commission of the underlying offense, impersonating a public officer.

Again, this Court has already placed Mr. Chesebro on a trial schedule that explicitly does not affect his 18 co-defendants. In doing so, this Court has *de facto* severed Mr. Chesebro's trial from that of his co-defendants. However, the considerations involved in severing co-defendant cases further illustrates the need for severing Mr. Chesebro's 7 charges from the other 34 charges in the indictment. Under Georgia law, the test for whether to sever a defendant's case from that of his co-defendants is "whether the number of defendants will create confusion during the trial; whether the strength of the evidence against one defendant will engulf the others with a 'spillover' effect; and whether the defendants' claims are antagonistic to each other's rights." *Overton v. State*, 295 Ga. App. 223, 236 (2008). In *Saylor v. State*, the Court found no abuse of discretion where the trial court denied the severance of the co-defendants' murder trial where the case involved only three defendants who were tried for almost all the same offenses relating to the same incidents. 316 Ga. 225, 231 (2023). In contrast, here, the 41 total counts of the indictment each charge different combinations of the 19 defendants for different offenses that took place on different dates over the course of nearly two years.

In sum, the 34 counts for which Mr. Chesebro is not charged must be severed because they are joined solely for their similarity to the 7 counts against Mr. Chesebro. Moreover, severance of those 34 counts is necessary to promote a fair determination of Mr. Chesebro's guilt or innocence as to each of the 7 counts for which he is actually charged. If the jury were to be advised of these unrelated counts at Mr. Chesebro's trial, this would create confusion of the issues, spillover, and the admission of unduly prejudicial evidence.

WHEREFORE, based on the foregoing reasons, Mr. Chesebro respectfully requests that the Court sever his case from all co-defendants and accordingly sever Counts 1, 9, 11, 13, 15, 17 and 19 from the rest of the indictment.

Respectfully submitted, this the 30th day of August, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the foregoing **MOTION FOR SEVERANCE OF CO-DEFENDANTS AND TO SEVER COUNTS 1, 9, 11, 13, 15, 17 AND 19 FROM THE REMAINING COUNTS IN THE INDICTMENT** in the above-referenced action to all parties via the Fulton County e-filing system.

This 30th Day of August, 2023.

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