

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

Case No. 23SC188947

v.

DAVID J. SHAFER et al.,

Defendants.

**DEFENDANT SHAFER'S SUPPLEMENT
TO MOTION TO SEVER**

Defendant David J. Shafer files this Supplement to Motion to Sever, and supplements Defendant's Motion to Sever, showing the following:

On September 6, 2023, the Court held a hearing on Defendant Kenneth Chesebro's and Defendant Sidney Powell's motions for severance. During the hearing, counsel for the State represented that the State's case against the defendants could take four months and involve 150 witnesses. The Court had set the trial of Mr. Chesebro to begin on October 23, 2023, following Mr. Chesebro's Demand for Speedy Trial. *See Case Specific Scheduling Order, August 24, 2023, p. 1.* In view of this estimate by the prosecution of the length of time anticipated to present its case and the massive amount of testimonial evidence which it intends to introduce at trial, ensuring Mr. Shafer's rights to due process and a fair trial dictates severing Mr. Shafer from any trial, pre-trial proceedings and scheduling relating to any co-defendants who have demanded a speedy trial pursuant to the Sixth Amendment to the Constitution of the United States; Article I, Section I, Paragraph XI of the Georgia Constitution and/or O.C.G.A. §§ 17-7-170 *et seq.*

Moreover, in further support of Mr. Shafer's Motion to Sever, Mr. Shafer shows that his attorneys in this action possess the following scheduling conflicts:

1. A criminal jury trial in the action of *United States v. Robertson*, case number 1:22-cr-00432-SDG-JEM, in the United States District Court for the Northern District of Georgia, Atlanta Division (*Robertson* action), the Honorable Steven D. Grimberg, United States District Judge, presiding, set for December 12, 2023, as shown by an Order Setting Jury Trial issued in the *Robertson* action, attached as Exhibit A. Counsel have estimated that the trial of the *Robertson* action will take approximately two weeks.

2. A criminal jury trial in the action of *United States v. Lewis et al.*, case number 1:22-cr-00432-SDG-JEM, in the United States District Court for the Northern District of Georgia, Atlanta Division (*Lewis* action), the Honorable Timothy C. Batten, Sr., Chief United States District Judge, presiding, set for January 16, 2023, as shown by an Order in the *Lewis* action, attached as Exhibit B. Counsel have estimated that the trial of the *Lewis* action will take approximately six to eight weeks.

3. Trial in the action of *United States v. Commerford et al.*, case number 22CR00209, in the Superior Court of Decatur County, South Georgia Judicial Circuit (*Commerford* action), the Honorable Heather H. Lanier, Chief Judge, presiding. The *Commerford* action is a prosecution under the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. §§ 16-14-1 *et seq.* During a hearing on August 31, 2023, Chief Judge Lanier informed counsel that the Court intended to set the trial in the *Commerford* action for February or March of 2024.

Respectfully submitted, this 8th day of September, 2023.

/s/ Craig A. Gillen

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CERTIFICATE OF SERVICE

Counsel for Mr. David J. Shafer shows that the foregoing document was this 8th day of September, 2023, served on the following individuals by depositing the document in the United States mail, postage prepaid; by statutory electronic service via Odyssey eFile Georgia and/or electronic mail to:

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA

v.

SHELITHA ROBERTSON

Criminal Action No.
1:22-CR-432-SDG

ORDER SETTING JURY TRIAL

The jury trial of this case for Defendant Shelitha Robertson is set for **Tuesday, December 12, 2023, at 9:00 a.m.**, in Courtroom 1706. The pretrial conference is set for **Monday, December 4, 2023, at 10:00 a.m.**, in Courtroom 1706.

Pre-Trial Deadlines

- Motions in Limine (if any): November 13, 2023
- Responses to Motions in Limine (if any): November 20, 2023
- Consolidated Proposed Voir Dire: November 20, 2023
- Consolidated Proposed Jury Charges and Verdict Form: December 1, 2023
- Exhibit List and Witness List (to Chambers): December 11, 2023 by noon.

Further instructions concerning these submissions are provided below.

Motions in Limine

Each party may file **one consolidated** motion in limine that shall not exceed 25 pages. Likewise, a response filed in opposition to a motion in limine shall not exceed 25 pages.

Proposed Voir Dire

The parties must file a single, unified list of proposed *voir dire* questions. The parties may divide the list according to the questions that each party proposes to ask. Any objections to a proposed question by the opposing party must be included directly below the question at issue.

Proposed Jury Charges and Verdict Form

The parties must file a single, unified set of the proposed jury charges and verdict form. A Word version of the same must be forwarded via email to Chambers.

Counsel must use the Eleventh Circuit Pattern Jury Instructions, if applicable. When proposing charges for which there is not a pattern charge, counsel must provide citations to the legal authorities supporting the charge requested.

Each request to charge shall be numbered sequentially and on a separate page, with authority for the requested charge cited at the bottom of the page. Where a proposed instruction is not agreed upon, the parties should indicate who

is proposing the instruction and the legal basis for the instruction, as well as the legal basis for the other party's opposition to the instruction.

Counsel will have an opportunity to amend and/or supplement their proposed jury charges and verdict form prior to the charging conference.

Exhibit List and Witness List

Each party shall email an exhibit list and witness list to Chambers. The exhibit list must include the style of the case and case number in a header or footer, and include the following column fields: (1) Exhibit Number; (2) Description; (3) Bates No or Source (optional); (4) Date Tendered; (5) Date Admitted. A template exhibit list can be provided upon request by emailing Courtroom Deputy Sonya Lee-Coggins. In addition, please note that each affixed exhibit sticker must include the case number and exhibit number, as well as the name of the tendering party. The sticker must be attached to the exhibit so as not to cover up or ruin any portion of the exhibit.

The witness list, or portions thereof, may be submitted *ex parte* if necessary. The parties must identify for the Court any witness who will require the assistance of an interpreter and the language that will need translation.

Speedy Trial

With the consent of the parties, the Court finds that the ends of justice outweigh the best interest of the public and the defendant in a speedy trial, and

therefore **DIRECTS** the Clerk to exclude the period of March 17, 2023 to December 12, 2023 from computation under the Speedy Trial Act, pursuant to 18 U.S.C. § 3161(h)(7)(A).

IT IS SO ORDERED this 20th day of June, 2023.



Steven D. Grimberg
United States District Court Judge

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

UNITED STATES OF AMERICA

v.

JACK FISHER; HERBERT
LEWIS; YEKATERINA
LOPUHINA; WALTER
DOUGLAS ROBERTS, II; JAMES
SINNOTT; VICTOR SMITH; and
CLAY MICHAEL WEIBEL,

Defendants.

CRIMINAL ACTION FILE

NO. 1:21-cr-231-TCB

ORDER

This case comes before the Court on Defendant Herbert Lewis's third motion [475] to continue trial or, alternatively, to sever this case.¹

¹ Also before the Court is Defendant Clay Weibel's objection to any continuance in this case, which is styled as a counter motion [476] to dismiss should the Court grant Lewis's motion to continue.

I. Background

Herbert Lewis has maintained his position that continuance of this case is necessary. He has also made it clear that he is amenable to severing the joint trial currently scheduled in this case for July 12.

On January 10, 2023, Lewis first moved [409] to continue this case. Brian Steel (who was lead counsel for Lewis) expected to be involved in a Fulton County trial through the summer. Smith also moved [410] for a continuance of trial for similar reasons. Fisher and Weibel, on the other hand, opposed [416 & 419] continuance. The Court ultimately granted [424] Lewis and Smith's motions for a continuance of trial and set the trial date of July 12.

On March 10, Lewis filed his second motion [463] to continue the case. Brian Steel indicated that the Fulton County trial would remain on-going well past the trial date of July 12. The Court denied [464] this motion, finding that Steel's co-counsel (Randy Chartash) was capable of trying this case for Lewis.

Lewis now moves [475] to continue this case because Mr. Chartash will be in trial starting on July 10 in another federal district

court. *See United States v. Jamie McNamara*, No. 2:22-cr-151-LMA (E.D. La.). Mr. Chartash filed this motion after the *McNamara* court denied a motion to continue filed in that case. Lewis again makes clear that severance would be an appropriate remedy should the Court decline to continue the case for all Defendants.

II. Discussion

As a preliminary matter, the Court will deny Lewis's motion to continue this case. The Court finds that continuing the case in its entirety would not properly balance the rights of all parties involved considering Fisher and Weibel's consistent objection to any continuance based on their Sixth Amendment right to a speedy trial. *See United States v. Anfield*, 237 F. App'x 538, 540 (11th Cir. 2007) (explaining how trial courts have "wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar" (quotation omitted)).

However, the Court will grant Lewis the relief he seeks by severing trial.

Federal Rule of Criminal Procedure 8(b) provides that an indictment “may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses.” An indictment with multiple defendants often results in a joint trial in order to promote efficiency and to avoid inconsistent verdicts. *See Zafiro v. United States*, 506 U.S. 534, 537 (1993).

But a joint trial is not required. Federal Rule of Criminal Procedure 14(a) gives courts authority to “sever the defendants’ trials” where a joint trial “appears to prejudice a defendant or the government.”

A defendant must show a “compelling prejudice to the conduct of his or her defense resulting in fundamental unfairness.” *United States v. Acosta*, 807 F. Supp. 2d 1154, 1269 (N.D. Ga. 2011) (citations omitted). *See also Zafiro*, 506 U.S. at 539 (describing how severance from joint trial is proper where a “specific trial right of one of the defendants” is impacted or where the jury may be prevented from making a reliable judgment).

This determination rests within the discretion of the trial court. *See Zafiro*, 506 U.S. at 541 (“Rule 14 leaves the determination of risk of prejudice and any remedy that may be necessary to the sound discretion of the district courts.”); *United States v. Blankenship*, 382 F.3d 1110, 1120 (11th Cir. 2004) (quotation omitted) (stating that severance is “a consideration involving substantial discretion” given to the trial court).

The Court finds that severance is warranted in this case. Lewis’s Sixth Amendment rights are at risk of being violated by conducting his trial on July 12. Mr. Chartash was brought on as lead counsel to this case in March, and he has a conflicting trial with the July 12 trial date. And even if the conflicting *McNamara* case were to not go forward, Mr. Chartash has stated that he began preparing for the *McNamara* case in lieu of this case.² The Court will accordingly sever Lewis from the trial set to begin on July 12.

² Mr. Chartash specifically stated that he “will not be ready to try this case on July 12, 2023 on behalf of defendant Herb Lewis, and will not be attending the trial in this case. Indeed, counsel for defendant Lewis will be preparing full-time for the case in the Eastern District of Louisiana.” [475] ¶ 10.

The Court will also sever Smith from the July 12 trial. As Fisher and Weibel contend, Lewis and Smith together comprise a specific role in the superseding indictment. Both are CPAs at “Accounting Firm 2,” and they face similar charges arising from their in their roles in the alleged conspiracy. For example, while the five other co-Defendants are charged in count two of the superseding indictment with wire fraud conspiracy, Lewis and Smith are not. Additionally, in this 135-count superseding indictment, Lewis and Smith collectively face 74 separate counts that are not applicable to any other co-Defendant.³

The Government objects to severance especially because this is a conspiracy case in which all seven co-Defendants are charged together on the first count.⁴ The Court recognizes the Government’s position and

³ Lewis is charged in counts 3 to 26 with wire fraud under 18 U.S.C. §§ 1343 and 2; counts 64 to 95 with aiding and assisting the filing of false tax returns under 26 U.S.C. § 7206(2); and counts 117 to 121 with subscribing to false tax returns under 26 U.S.C. § 7206(1). Smith is charged in counts 27 to 32 with wire fraud under 18 U.S.C. §§ 1343 and 2, and in counts 96 to 102 with aiding and assisting the filing of false tax returns under 26 U.S.C. § 7206(2).

⁴ The Government also contends that severance would lead to a duplication of trials with a similar length and number of witnesses. However, the Court believes that the two trials will not be overly duplicative. This argument is alone rebutted by the many separate counts faced by Lewis and Smith.

that a joint trial is preferred for conspiracy counts. But in a situation as here, where the Court has found that Lewis would otherwise be prejudiced by going to trial on July 12, and with the broad discretion this Court has over controlling its docket, the Court finds that severance is warranted for the reasons discussed above.

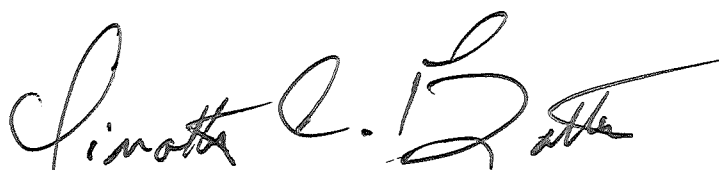
III. Conclusion

For the foregoing reasons, the Court grants in part and denies in part Lewis's motion [475] and Weibel's motion [476] by finding that severance of this trial is warranted. The trial of Defendants Fisher, Sinnott, and Weibel remains scheduled for July 12.

Jury trial for Defendants Lewis and Smith is set for Tuesday, January 16, 2024, at 9:30 a.m. in Atlanta Courtroom 2106. A pretrial conference is set for Monday, December 11, 2023, at 9:00 a.m. in Courtroom 2106. Motions in limine shall be filed on or before November 27; responses to motions in limine shall be filed on or before December 4. Only one consolidated motion in limine shall be filed by each party, and the motion shall not exceed 25 pages. The response brief to the motion in limine shall not exceed 25 pages.

The time between the date of this notice and the beginning of this trial on January 16 shall be excluded from the calculation of time under the Speedy Trial Act—as it pertains to Lewis and Smith—because the delay is for good cause and in the interests of justice.

IT IS SO ORDERED this 5th day of June, 2023.

A handwritten signature in black ink, reading "Timothy C. Batten, Sr.", written in a cursive style. The signature is positioned above a horizontal line.

Timothy C. Batten, Sr.
Chief United States District Judge