

IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

STATE OF GEORGIA,

v.

KENNETH CHESEBRO, ET AL.,  
DEFENDANTS.

CASE NO. 23SC188947

JUDGE MCAFEE

**MOTION IN LIMINE TO EXCLUDE ANY REFERENCE TO THE JANUARY 6TH  
ATTACK ON THE U.S. CAPITOL**

COMES NOW, Defendant Kenneth Chesebro, by and through undersigned counsel, and moves this Honorable Court to exclude any reference to the attack on the U.S. Capitol on January 6, 2021, as irrelevant, unduly prejudicial, and improper character evidence under Georgia Rules of Evidence 401 through 404. In support thereof, Mr. Chesebro states as follows:

**I. BACKGROUND**

Mr. Chesebro is charged with 18 other individuals in a sprawling 98-page indictment. The indictment charges Mr. Chesebro with the following seven counts:

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 charges against Mr. Chesebro, do not involve Mr. Chesebro and are not relevant in the prosecution or defense of his trial.

Indisputably, the most extensive charge in the indictment is Count 1, the RICO charge. It spans over 50 pages, contains 161 overt acts, and allegedly occurred between November 4, 2020 and September 15, 2022. But as extensive as it is, Count 1 mentions the January 6, 2021 attack on the U.S. Capitol only twice in passing. *See* Indictment, Overt Acts 7 & 159. Both are in reference to testimony provided before the U.S. House Select Committee to Investigate the January 6th Attack on the U.S. Capitol. Moreover, Mr. Chesebro is not mentioned in either Overt Act.

The indictment does not allege any unlawful conduct by Mr. Chesebro occurred on January 6, 2021. In fact, the indictment does not contain *any* allegations about what he did or where he was on January 6, 2021. News outlets have reported that Mr. Chesebro was in in the vicinity of the U.S. Capitol on January 6, 2021.

## **II. ARGUMENT AND CITATION TO AUTHORITY**

### **A. Any Evidence Regarding Mr. Chesebro on January 6, 2021 Is Irrelevant**

Under Georgia law, irrelevant evidence is inadmissible, and relevant evidence is admissible subject to other Georgia Rules of Evidence, laws, or constitutional requirements. O.C.G.A. § 24-4-402. Evidence is “relevant” if it has any tendency to make a fact of consequence more or less likely. O.C.G.A. § 24-4-401. Georgia courts hold that “the extent to which evidence tends to make the existence of a fact more or less probable depends significantly on” (1) “the quality of the evidence”; (2) “the strength of its logical

connection to the fact for which it is offered”; (3) “how much it adds to the other proof available to establish the fact for which it is offered”; and (4) “the need for the evidence.” *Freeman v. State*, 365 Ga. App. 332, 343 (2022) (alterations adopted); accord *Matter of Tapley*, 308 Ga. 577, 581 (2020).

“Although th[e] relevance standard is a liberal one, it is not meaningless or without boundaries.” *McIver v. State*, 314 Ga. 109, 145 (2022). Georgia courts hold that “relevance is a binary concept—evidence is either relevant or it is not.” *Matter of Tapley*, 308 Ga. at 581 (alterations adopted) (quotations omitted). In other words, at a trial, all “evidence must relate to the issue[s] being tried and irrelevant matter should be excluded.” *Clark v. State*, 149 Ga. App. 641, 644 (1979).

Here, Mr. Chesebro is charged with seven conspiracy counts: Counts 1, 9, 11, 13, 15, 17, and 19. Count 1 charges a RICO conspiracy to unlawfully change the outcome of the 2020 presidential election. The allegations within Count 1 relate to the electoral vote. The remaining six counts also relate to the meeting of contingent Republican elector slate on December 14, 2020 and the slate’s Certificates of the Vote and Vacancy Filing Notice.<sup>1</sup> None of the alleged conduct for which Mr. Chesebro has been indicted involves the attack on the U.S. Capitol on January 6, 2021. In fact, the entirety of Mr. Chesebro’s alleged

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<sup>1</sup> Counts 9, 11, 13, 15, 17, and 19 are each alleged to have occurred on and between December 6, 2020 and December 14, 2020. The indictment also charges the commission of the underlying offenses of those conspiracies in separate counts. The indictment alleges that all of the underlying offenses have either been completed or attempted to have been completed on or about December 14, 2020. Accordingly, any conduct or event that occurred after December 14, 2020 is irrelevant to the State’s case on Counts 9, 11, 13, 15, 17, and 19.

conduct charged in the indictment occurred from December 6, 2020 to January 4, 2021.<sup>2</sup> Moreover, the indictment does not charge anyone with criminal acts that took place on January 6, 2021.<sup>3</sup> Anything that Mr. Chesebro did or did not do after January 4, 2021 does not have any tendency to make any material allegation more or less likely. In other words, the events that took place on January 6, 2021 are irrelevant to Mr. Chesebro. Thus, any evidence regarding January 6, 2021 and any reference to it are inadmissible and should be excluded.

**B. Any Reference to the January 6th U.S. Capitol Attack Is Unduly Prejudicial, Misleading, Confuses the Issues, and a Waste of Time**

Even if the Court finds that such evidence is relevant, it must still be excluded because it is unduly prejudicial. Under Georgia law, “[r]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” O.C.G.A. § 24-4-403. Both our state’s and our nation’s highest Courts hold that “‘unfair prejudice’ speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on an improper basis rather than on proof specific to the offense charged.” *Harris v.*

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<sup>2</sup> More specifically, Count 1 alleges that Mr. Chesebro’s unlawful conduct occurred between December 9, 2020 and January 4, 2021. Although it also alleges in Overt Act 39 that John Eastman sent a memorandum by Mr. Chesebro to Rudy Giuliani on December 7, 2020, it does not allege any *action* by Mr. Chesebro in Overt Act 39. As stated, the remaining Counts allege that Mr. Chesebro’s unlawful conduct occurred between December 6, 2020 and December 14, 2020.

<sup>3</sup> Count 1 of course lists several actions by co-defendants on January 6, 2021 as overt acts in furtherance of the RICO conspiracy. However, the indictment does not identify any of those acts as *predicate* acts for RICO purposes (nor would they qualify as such). In fact, none of those acts constitute, by themselves, criminal offenses.

*State*, 314 Ga. 238, 263 (2022) (quoting *Old Chief v. United States*, 519 U.S. 172, 180 (1997)); accord *Pierce v. State*, 302 Ga. 389, 394–95 (2017) (noting that such an improper basis is “commonly, though not necessarily, an emotional one”).

Here, it is indisputable that the attack on the U.S. Capitol on January 6, 2021 conjures a strong emotional response in ordinary citizens. To suggest otherwise is laughable. Any evidence regarding either the attack or Mr. Chesebro’s conduct or whereabouts on January 6, 2021 would inflame the passions of the jury. Such evidence, and any reference to it, is therefore unduly prejudicial. This prejudice substantially outweighs any probative value that this evidence could have. Even long before the legislature revised the Evidence Code, Georgia courts recognized that “[t]estimony totally irrelevant or immaterial, but which is calculated to arouse prejudice or passion against the accused, should not be admitted in evidence.” *Thomas v. State*, 95 Ga. App. 699, 707 (1957). Thus, this evidence should be excluded.

Additionally, such unfair prejudice is aggravated by a danger of confusion of the issues and misleading the jury. This case has been widely hailed, and chided, by pundits, reporters, and laypeople as an exceedingly complex case against over two and a half dozen defendants.<sup>4</sup> The issues at the heart of Mr. Chesebro’s case involve important

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<sup>4</sup> See, e.g., Sam Gringlas, *Why the Trump Criminal Case in Georgia Is So Complicated*, NPR (Sept. 1, 2023, 5:00 AM), <https://www.npr.org/2023/09/01/1197080384/georgia-trump-election-case-legal-complexities>; Carl P. Luebsdorf, *Complicated Georgia Indictment of Trump Poses Problems*, SEATTLE TIMES (Aug. 15, 2023, 9:26 AM), <https://www.seattletimes.com/opinion/complicated-georgia-indictment-of-trump-poses-problems/>; Peter Grier, *Trump’s Georgia Case: Large Cast of Characters Portends Complex Trial*, CHRISTIAN SCIENCE MONITOR (Sept. 6, 2023), <https://www.csmonitor.com/USA/Politics/2023/0906/Trump-s-Georgia-case-Large-cast-of-characters-portends-complex-trial>; Erin Doherty, *The Georgia Case Against Trump Is Loaded with*

understandings of what was clearly discernible – and what was open for interpretation – about the Electoral Count Act in 2020 and the scope of a lawyer’s legal advice with respect to the Electoral Count Act. The independent actions and motivations of Mr. Chesebro’s co-defendants and co-conspirators already complicate the jury’s role in separating Mr. Chesebro’s knowledge and intentions from those of more sinister characters. To admit evidence of the attack on the U.S. Capitol further complicates these issues.<sup>5</sup> This evidence, and any reference to it, would serve only to confuse or mislead the jury into thinking that it must consider Mr. Chesebro’s alleged involvement in the January 6th events in deciding whether he is guilty of the indicted crimes.

**C. Any Evidence Regarding Mr. Chesebro on January 6, 2021 Constitutes Improper Character Evidence**

Any reference to or evidence of either the attack on the U.S. Capitol or Mr. Chesebro’s conduct or whereabouts on January 6, 2021 would be to impugn his character by insinuating his participation or involvement with the attack on the U.S. Capitol. Under Georgia law, evidence of one’s character is not admissible to prove action in conformity therewith. O.C.G.A. § 24-4-404(a). Further, evidence of bad acts may only be offered for an admissible purpose such as motive, intent, knowledge, preparation, plan, identity, absence of mistake, or lack of accident. O.C.G.A. § 24-4-404(b).<sup>6</sup>

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*Breathtaking Ambition*, <https://www.axios.com/2023/08/15/georgia-indictment-fani-willis-trump-rico> (updated Aug. 15, 2023).

<sup>5</sup> It also wastes precious judicial economy by spending time on unalleged matters in a case that is already expected to last no less than four months.

<sup>6</sup> Rule 404(b) requires that the State give reasonable notice to the defense in advance of trial. Although trial is scheduled to begin in less than two weeks, the State has not yet provided any 404(b) notice.

Georgia courts hold that for other bad acts to be admissible, the State must show that “(1) the evidence is relevant to an issue other than the defendant’s character, (2) the probative value is not substantially outweighed by undue prejudice under [Rule 403], and (3) there is sufficient proof so that the jury could find that the defendant committed the acts.” *Booth v. State*, 301 Ga. 678, 682 (2017).

Here, any reference to January 6, 2021 cannot show any kind of admissible purpose. First and foremost, the *only* way in which such evidence could prove motive, intent, or some other admissible purpose would be through an improper propensity inference—to wit: defendant’s alleged connection to the U.S. Capitol attack shows his propensity, and thus his motive, to change the election outcome in favor of Trump. Second, the State cannot prove that Mr. Chesebro committed any criminal or unlawful act on January 6, 2021.<sup>7</sup> Third, Mr. Chesebro’s criminal charges are not at all similar to any potential criminal or civil charges that could be brought against a participant in the U.S. Capitol attack. Assuming *arguendo* that Mr. Chesebro participated in the U.S. Capitol attack, such an act could not provide any useful comparison for the crimes for which the State has indicted him. It cannot show that Mr. Chesebro possessed the type of specific

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<sup>7</sup> The best the State could prove would be mere presence or proximity. But there are countless people who were present or near the attack on the U.S. Capitol when it occurred but did not participate in it (e.g., reporters, D.C. residents, tourists). Moreover, it has been estimated that *thousands* of people were present on the National Mall that morning before the attack. Thus, given the sheer number of people who were in D.C. on January 6, 2021, mere presence in the vicinity is insufficient to prove that Mr. Chesebro was involved in the attack. The State’s only means for proving any possible involvement would necessarily rely on weak logic and an improper propensity inference: if Mr. Chesebro was in D.C. on January 6, 2021, then he must have participated in the attack on the U.S. Capitol.

intent required for his charges.<sup>8</sup> It cannot show *modus operandi*. It cannot show opportunity to commit the charged offenses. It cannot show preparation to commit the charged offenses.

### III. CONCLUSION

WHEREFORE, Mr. Chesebro respectfully moves this Court to exclude any reference to the attack on the U.S. Capitol on January 6, 2021 – or, in the alternative, any evidence regarding Mr. Chesebro’s conduct or whereabouts on January 6, 2021 – because it is irrelevant, substantially more prejudicial than probative, misleading, a confusion of the issues, a waste of time, and improper character evidence.

Respectfully submitted, this 20th day of October, 2023.

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<sup>8</sup> Mr. Chesebro’s defense is, and always has been, that he was providing legal advice on a novel interpretation of 130-year-old statute. Mr. Chesebro believed that his interpretation and advice was lawful and complied with the Electoral Count Act based on the minimal existing precedent and the plain language of the statute. What happened on January 6, 2021 sheds no light on whether Mr. Chesebro believed his actions were lawful.



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing Motion in Limine to Exclude Any Reference to the January 6th Attack on the U.S. Capitol upon counsel for the State of Georgia via the e-filing system.

ON THIS, the 20th day of October, 2023.

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